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✣ IN MEMORIAM ✣

THE RIGHT REVEREND EDWARD G. ROELKER, S.T.D., J.C.D., DEAN THE SCHOOL OF CANON LAW *

IT IS not my intention to preach a formal eulogy on this occasion nor would he who has been so suddenly taken from us wish it. But there are certain duties we owe to our dead and therefore as Acting Rector I must extend a sincere expression of sympathy from our entire University family to Monsignor Roelker's relatives, to his Ordinary, Archbishop Alter and to his fellow priests and friends of the Archdiocese of Cincinnati. They are with us today in mourning his passing. There are, moreover, certain lessons that we the living should pause to learn from the memory of our departed colleague, not the least being that in the midst of the excessively active life of our time it is still possible for a man to be a saintly scholar.

It is natural, I suppose, that we should think of him first of all as a true and faithful friend. I shall always be grateful to him for his kindness to me, ever since the time when I was a student priest and he a young professor. The difference in status and in our areas of study constituted no obstacle, and I was privileged to spend many happy hours in his stimulating company. Then I came to appreciate the power of his quick and keen mind and his astonishing combination of learning

* Sermon delivered by the Right Reverend William J. McDonald, M.A., Ph.D., Rector, The Catholic University of America, on the occasion of the Funeral Mass celebrated Thursday, October 31, 1957 for the Right Reverend Edward G. Roelker, S.T.D., J.C.D., Dean of the School of Canon Law.

and lightness. Opposed to any semblance of cant, he loved to puncture pretense, and those who resorted to ornamental erudition soon felt the sting of his rapier-like thrusts. Yet withal, despite the frequent quip of the tongue, there was a pervading sympathy and friendliness. While he avoided servility and false humility, he was never arrogant or over-bearing. The hallmarks of his character were honesty, forthrightness and integrity. Blessed with a clear insight he was perfectly straightforward and transparently truthful in all his lines of thought and action.

A teacher at our National Catholic University for more than a quarter of a century, Monsignor Roelker was best known for his expert knowledge of Canon Law, particularly of his specialty, which was public ecclesiastical law. His many articles and books attest the extent as well as the depth of his learning, but what was most satisfying to the casual inquirer and to his students was that he was able to answer practical questions with almost clinical precision. Neither were his interests and talents confined to one field. He knew and loved music; he was an authority on liturgical matters and for a time he taught courses in philosophy at Trinity College.

In the past five years Monsignor Roelker served as Dean of our School of Canon Law. Under his administration the School has flourished. He was meticulous in answering correspondence and in caring for the day by day, often dull, routine of his office. He has set a shining example for all of us in his total dedication to the work of the University. The University was his life and for him teaching was a full time occupation. He excluded all other attractions and pursuits knowing well that if one is to mature as a scholar and conscientiously discharge his duties as teacher he must be willing to pay that penalty.

The life of the professor, especially the priest professor, is indeed hard, truly a life of sacrifice in which we must be prepared to enter our Gethsemane or even ascend our Calvary. It has few of the spiritual consolations that accompany priestly

ministrations elsewhere, and yet when we reflect on even the tangible results achieved by men such as Monsignor Roelker, in the number of bishops, of chancery officials, of Seminary rectors and leaders he has trained, we begin to realize how paramount and palmary is the importance of this work.

Of its nature Monsignor Roelker's work brought him in contact mainly with the clergy. To them, certainly to us who were privileged to live with him it is no exaggeration to say that he was a model of the truly Christ-like priest. He was devout in his own simple, unostentatious way. Each morning found him meditating for long periods both before and after he had offered Holy Mass. In the thirty-three years since his ordination—and this is an extraordinary record even for a priest—he anticipated the Divine Office every day save one.

It is easy enough for us as priests to identify ourselves with Christ as offerer of the Eternal Sacrifice, but how rarely do we stress our identification with Christ as Victim. Monsignor Roelker knew that side of the priesthood too. For many years he had been ailing, but because of his uncomplaining disposition and his continued assiduous attention to his duties we little suspected how much he must have suffered. He may have had some premonition that the end was in sight for only last week he asked for an appointment to see me in my office. That too was characteristic of him since we lived in the same building, and he knew he could see me at any time. But he insisted on coming to the office and there discussed with me at length the future of his beloved School of Canon Law. He told me of his failing health, asked to be relieved of the Deanship and went on to make recommendations for the welfare of his school, giving evidence as always of his sound judgment.

It has been well said: As a man lives so shall he die. As Monsignor Roelker carefully and methodically arranged his temporal concerns, we might be quite sure that with his genuinely Christian outlook he did not neglect the spiritual. Fortified by the rites of the Church he went forth to meet his Maker. But the unity that bound us to him in life is not sev-

ered. Now he needs our prayers if he is soon to be released from the purgatorial fires which even the best of human beings must expect. His cry at this time is that of all poor souls: "Have pity on me, have pity on me at least you my friends for the hand of the Lord has touched me."

He would say to us now in the words of St. Bernard: "My merit is in the mercy of the Lord. I am clearly not devoid of merit as long as He is not devoid of mercy. And if the mercies of the Lord are from eternity to eternity I will sing the praises of the Lord forever."

May his noble priestly soul rest in eternal peace!

Amen

LIBERTY UNDER THE LAW *

THE second half of this twentieth century has witnessed a striking renewal of interest in religion. I hesitate to call it a religious revival as some phases of this new piety are questionable, such as the cult of peace of mind. Yet it does represent at least a halt in the progress of secularism in America. One foreign writer has called it "The New American Revolution." It is a revolution in the sense that it marks a return to the fundamental faith of the men who fought the War of the Revolution and who then established the American way of life.

In legal circles, as you well know, this renewal has crystallized in a movement back to Natural Law, the moral foundation on which American law was built. Your own Guild here in New York has made a real contribution to this movement by holding annual conferences on Natural Law.

Since Civil Rights are such a burning issue today, I would like to direct your attention to the religious and moral foundations of our American concept of Civil Rights. In the Zorach released-time case, Justice Douglas said: "We are a religious people whose institutions presuppose a Supreme Being." American Civil Law definitely presupposes a Supreme Being in its concept of Civil Rights. The Declaration of Independence says: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness."

The early American concept of Civil Rights was therefore based upon a theology. No matter what their denominational loyalties might have been, the Founding Fathers looked upon every man as a child of God, of infinite value in His sight.

* Sermon delivered at the Red Mass of The Guild of Catholic Lawyers, at St. Patrick's Cathedral, New York City, on October 20, 1957, by the Reverend John B. Sheerin, C.S.P., LL.B., Editor of *The Catholic World.*

They regarded the human person as sacred. They conceived every person to possess a nature which by its inner dynamic demanded a development of its spiritual as well as its physical faculties, and they insisted that the State should protect the person in this task of self-knowledge and self-discipline. They held that the purpose of human life was to prepare the person for eternal happiness hereafter and they maintained that the State must protect the person in his pursuit of happiness. It was not to intrude into the drama that takes place in the soul of every man whereby he works out his eternal destiny. Indeed they felt that the State should even see to it that the human person was to be free from all outside interference. It was the mind of the Founding Fathers that the State would pervert its own function if it obstructed or tolerated an obstruction to the development of the spirit of man.

Historically English Common Law recognized these freedoms and at times the Courts pronounced null and void any Acts of Parliament that infringed the rights of a child of God on his earthly pilgrimage to his Creator. The thinking of those judges was the thinking of those artists of the Middle Ages who embossed on the great doors of European cathedrals the figures of kings going down to Hell for violating the rights of their subjects.

Today there are law professors and jurists who recognize the existence of Civil Rights but who refuse to recognize the theological presuppositions behind those rights. They accept these rights as facts but they do not accept the theology that brought those facts into existence. They presume that persons possess Civil Rights by grant from the State rather than by virtue of the person's relation to God.

But you cannot have a flower unless you have the plant that produces the flower. You cannot have rights unless you accept the reasoning behind those rights, otherwise the rights are unreasonable. You cannot continue to have Civil Rights in American Law unless you accept the theological presuppositions of American Law. Oh yes, these rights can live for a

while divorced from their source of vitality. A flower can live for a while broken from its stem. An empty bottle of perfume can retain its odor for a time. But when Civil Rights are cut off from their source, they soon die. For they become empty forms, lifeless formulas. They are powerless to stand up today against the terror of gigantic collectivism or the blandishments of dictators who ask men to give up their rights for a mess of pottage. The nineteenth century European Liberals who accepted Civil Rights without faith in God became the Communists of the twentieth century.

The story of Communism is the story of Karl Marx, whether it be Yugoslavian or Chinese or Russian Communism. It is the story of a baptized Christian who renounced his theology of the human person and created a philosophy that spawned the worst despotism the world has known. Marx said that God was an illusion. He claimed that centuries ago, man realized he possessed good qualities but also realized he was unhappy. So he lumped together all his good qualities, truth, honor, justice, etc., and he called the result God. He bowed down before this imaginary God and dreamt that this God would make him happy in the life to come. According to Marx, it was not individuals here and there who alienated themselves in this way. It was society that alienated itself and he claimed that society would have to destroy this illusion of God, this opium of religion, so that it could set about removing the root cause of the unhappiness—the capitalist exploiters. After society had shaken off religion, then the workers could march forward under the Communist banner to the collective paradise. But there could be no personal freedom on the way. There would have to be a dictatorship of the proletariat. For the collective will of the proletariat was the very law of history and it would be folly for any person to try to turn back the wheel of history. Voltaire said that if there were no God, you would have to invent one. Marx tried to kill God and then he substituted the Iron Law of History.

What has happened to the human person under atheistic Communism? I need not labor the obvious. You know of

the millions murdered or transported to Siberia for defying the regime. But what about the person who has remained loyal to the regime? He has been dissolved. He has been merged into the masses. He is an egg cracked into the revolutionary omelet, raw material for the society that is in process of becoming. He is no longer a man. He has no value in himself. Should he " deviate " ever so slightly, he is thrown into the " trash basket of History." He has become a cipher.

Arthur Koestler, an ex-Communist, has given us in his novel, *Darkness at Noon,* a haunting but fearfully true picture of a man who has lived by the atheistic humanism of the Communist Party. The book is a psychological study of the Communist mentality. Rubashov, a high-ranking Soviet official, has been imprisoned and as he meditates in his cell, he comes to realize that the human person is important, that " the first person singular " is not a grammatical fiction nor a mere number in society.

In his earlier days Rubashov had been a loyal Party member. He had instructed younger men that they must forget their own rights and resign themselves to being scourged and whipped, for the Party represented the course of history. He would say to young Communists: " The Party, comrade, is more than you and I and a thousand others like you and I. The Party is the embodiment of the revolutionary idea in history. Inert and unerring she flows towards her goal. At every bend in her course she leaves the mud which she carries and the corpses of the drowned. . ."

The Communist ethics, he had told them, starts from the basic principle that the collective goal justifies the use of any and every means and it demands that the individual subordinate himself to the Party. He should even surrender his conscience. " When the accursed inner voice speaks to you, hold your hands over your ears." Knowing that death was near, Rubashov felt that the Party had failed because it was too ruthless with persons. He hoped that a new society might appear, (perhaps it would be religious-minded), a society that would show respect for the person.

What I am trying to say is what Whittaker Chambers said in his book, *Witness:* Atheism leads logically to the torture chambers of the Lubianka and the slave camps of Siberia.

This trend of return to Natural Law in the United States is surely a hopeful sign. After a long, cold winter of pragmatism and materialism in legal philosophy, we see some indications of a second springtime. According to the warm, living concepts of Natural Law, the human person enjoys those Civil Rights that are necessary for him to work out his eternal destiny, and it is the duty of the State to protect him in the enjoyment of these freedoms. Civil Rights will be safe in the United States as long as American Law recognizes not only the mere existence of these rights but also the reason for their existence—the dignity of the human person who was made by God, who is stamped with His image and destined for eternal union with Him in the life to come.

THE NOBILITY OF THE LAW *

WE WELCOME you, Ladies and Gentlemen of the Bench and Bar, to this supreme act of worship, which is dedicated to the Holy Spirit and in which we humbly call down upon you in your judicial and legal activities the blessing and guidance of Almighty God. Your lives are dedicated to the study and practice of the law, to its interpretation, and to its application; and in this role you are clothed in a mantle of nobility and dignity of which you should ever be as conscious as you are proud. Not only is there a nobility inherent in the Law itself and which, therefore, no man can erase; but from time immemorial, since the first society was formed and the first law enacted by man, your profession has ever been looked upon as a noble vocation and mankind has accorded it a respect and admiration sometimes akin to worship.

The nobility of the Law and the prestige you enjoy as its members arise from a threefold source, any one of which would justify the eminent position your profession holds in the estimation of your fellow men. First of all, there is the relationship that exists between all true human law and the Eternal Law; secondly, there is the vital function it performs in society; and finally, there is the service it renders to the individual.

The classical division of the Law into Eternal, Natural and human positive law demonstrates the intimate connection between the law of God and the law of man. It testifies to the link that must exist between human and divine legislation. The ultimate source of all law is the Eternal Law, which is simply the Divine Wisdom governing and directing all creation. The Eternal Law is, in a word, the Will of God. That

* Sermon delivered by the Very Reverend Raymond A. Wegmann, J.C.L., Vice-Chancellor, Archdiocese of New Orleans, on the occasion of the Red Mass celebrated in St. Louis Cathedral, New Orleans, October 7, 1957.

there must be a real relationship between all our laws and the Eternal Law was first suspected by the Greek and Roman jurists; then, as the Christian Faith took hold and grew, it became universally accepted and was understood and appreciated by our Founding Fathers. It is this essential kinship between the laws of man and the Eternal law which is the wellspring of the nobility which enshrines the law in dignity and majesty and which gives you the distinction you enjoy as judges and lawyers.

When Almighty God ordained the creation of a vast universe, the center of which was to be this earth, inhabited by creatures made to His own image and likeness and destined to find their ultimate perfection, their final end, in Him Alone, He ordained at the same time that the very nature of man should be to him the ruling norm in all his actions, whether those actions be related to God or his fellow men. Pure reason, unhindered and perfect, was to have guided man in such a way that he would have acted always and unerringly according to his rational nature.

Written into the heart of man, engraved upon his reason, this Natural Law was and is for all men, God's expression of His Eternal Law. Man, however, fell from grace and suffered the weakening of his will and the darkening of his intellect. Thus fallen, his ability to know and follow the Natural Law was so impaired that God found it necessary to give him a codification of the Natural Law in the Ten Commandments.

Leaving it to the Theorists to speculate on whether in the state of Original Justice there would have been need for human legislation, the fact is that fallen mankind could not exist with any semblance of order or justice without its own set of laws; that just as God had clarified the Natural Law in the Decalogue, so also is it necessary for man further to clarify the Natural Law by applying it to man's needs according to circumstances of time and place. Human legislation is a natural necessity, so that we can assert without fear of contradiction, that all true human law is not only by God's authority but

also according to His divine providence. This same Divine Authority, however, demands that all human legislation be derived from and be in conformity with the nature of man.

The Natural Law, therefore, is the bridge that connects human law to the Eternal Law. Just as the Natural Law is a participation in, and expression of, the Eternal Law, so also must all human legislation find its basis in the Natural Law.

Or, as Thomas Aquinas expressed it, "every law enacted by man enjoys the character of law to the extent that it is derived from the Natural Law" (I-II, 95, 2c). Our human law will be true law only in so far as it expresses the Will of God for man. Because God is, of necessity, the Source of all true law, this alone can be the norm by which we can judge a law to be good or bad, true or false.

This intimate alliance between the law of man and the Divine Authority points up the true function of the law in Society: it is one of the channels through which Divine Providence, relying upon the cooperation of free man, would govern the lives of His children. The Law should seek the same objectives for mankind which Almighty God envisions, namely, the perfect ordering of society toward the common good and the salvation of its individual members. Viewed in this light, we can speak not only of the nobility of the law but of its sacredness too, for every true law becomes, in fact, an expression of the Will of God.

Let society depart from the true nature of law, let it divorce its law from God, and only chaos can result. Instead of order under justice there comes regimentation and servitude under the guise of justice.

We who have lived through a Second World War which was promoted by men who first divorced the law from God, and then used their perverted law to bring their nations and peoples under despotic control; and who live today in a Cold War which is waged by nations which deny not only the law of God, but God Himself, have first-hand evidence of the dire consequences that follow when the law is made to assume a

role in society which is alien to its noble purpose and contrary to its sacred nature.

So also, however, do we have first-hand evidence of the blessings that come to a nation in which the law functions as God intended and in which its legislatures and its courts are aware of the Divine Authority. Of course, no one would dare assert, much less admit, that all the laws of our nation, our states and our cities are good and true laws when judged according to the norm we have indicated. The Natural Law has been violated too often and there are too many statutes on the books to which the Almighty would not lay claim. But these imperfections and failures do not argue against the true nature of law or its responsibility to respect the Eternal and Natural law any more than the shysters and charlatans in the legal profession would argue against its integrity and its lofty purposes. With our basic legal institutes founded in the Natural Law and our jurisprudence replete with decisions arrived at solely under that law, we can take pride in our legal traditions and practices and, while recognizing our imperfections and our weaknesses, respect and love the law, all the while hoping and striving for perfection, seeking in our legislatures and our courts to accomplish the will of God. If all of this seems too idealistic, we should remember that it is the noble character and sacred function of the law itself which present the challenge.

It is certainly not necessary for me to point out to you how important is the law to the individual: its greatest beneficiary. It is the individual member of society who suffers first and most when the law is abused, just as he benefits most when it measures up to God's designs. And while it may appear that the average man takes the law for granted; while he may become vocal in his appreciation of it only when his rights have been abused or his freedom impinged so that he must seek redress or protection; nevertheless, you as lawyers know that the law is not only man's best friend, it is also his devoted servant. As you seek to vindicate or protect the rights of your clients, as you call upon the law to bring justice and equity to

them, you are always aware that man lives in daily dependence upon the law. And thus we account for the third source of the nobility of the law: namely, the tremendously vital service it renders to the individual in society. And so, Ladies and Gentlemen of the Bench and Bar, I submit to you that the law is noble, because it partakes of the Divine Authority, because it performs a sacred function in society, and because it is an indispensable servant of the individual.

If now, you admit the validity of these premises, what conclusions will you draw? What impact will such convictions have upon you personally? The consequences, I believe, could be many; allow me to suggest only a few.

First of all, your presence here this morning makes significantly good sense. Only he who recognizes the Supreme Lawgiver is worthy to serve under Him. Because as judges and lawyers you participate in the work of Divine Providence, it is most important that you begin the judicial year not only by paying your respects to God, as it were, but also by calling upon Him for enlightenment and guidance. How practical and logical would it not be if every judge before he ascended the bench were to offer a prayer to the Holy Spirit that he might exercise justice and mercy so as to reflect the divine attributes; and if every lawyer before he counselled a client or appeared before the Bar, were to invoke the help of the Divine Lawyer in behalf of that client? Not only practical and logical, but how beneficial to the Judge, the Lawyer, the client and society!

Next, I would conclude that the legal profession is no mere craft for earning one's living, but rather partakes of the nature of a dedicated vocation where one's primary interest is to serve God by serving society and its members. There is an awesome responsibility, first to society itself because every legal act is, of necessity, of public interest, and then to the individual because he puts his confidence in the lawyer, and places his welfare in his keeping.

Finally, it would follow that only men and women of the highest integrity are worthy to be servants of the law. Because in aspiring to the legal profession one aspires to participate in the Almighty's governing power; because in serving the law one assumes a sacred and public responsibility, honesty, incorruptibility, and fidelity are indispensable virtues in anyone who would dare to ascend the bench or go before the bar of Justice.

May it not be suggested to you, that today and each year at this time, you ask yourself why you became a lawyer, what your attitude is toward the law, and what the legal profession means to you. The law is indeed noble; its practice is noble. This places a heavy responsibility upon your shoulders and requires great things of you. Today, you are a judge, and you hear arguments and render a decision which affects the life and destiny of another; or, you are a lawyer, and you present the arguments and plead the case of a client who has placed his hope in you. One day, you will be neither judge nor lawyer, but a client, and you will stand before the Divine Bar, to hear the decision of the Judge Almighty. May it please Him to grant that each of you, when that day comes, will merit from His lips the consoling and rewarding judgment: "Well done, good and faithful servant," servant of My Law!

CHANGE AND PERMANENCE IN LAW

WHETHER and how there can coexist, in one and the same object or subject, both change and changelessness is a problem which arises not only in connection with law. It is, we would rather say, the fundamental problem which springs of necessity from our consciousness, which cannot fail to observe how our being partakes both of a reality of the senses and of a reality beyond the senses—belonging as it were to two worlds. Yet the relationships between the one kind of reality and the other appear very difficult to define. Primitive man while still in his wild state perceived the distinction between body and soul, and attributed to the latter a kind of survival beyond the death of the former. Even if in the early concepts and imaginings about this matter fantasy and myth were the dominant characteristics, there remains the significant fact that in every epoch the human mind has attempted to penetrate the great mystery. For hundreds and indeed for thousands of years the great philosophers have devoted their intellects to that problem. They have, assuredly, clarified various aspects of it, but nevertheless they have failed to find a complete solution by means of the powers of reason alone; and so there always remained open access to the supreme demands of faith.

Certainly the effort of materialist philosophers (especially those of last century, such as C. Vogt, J. Moleschott and L. Büchner) to explain thought as "a movement of matter" or "a secretion of the brain" has failed; for matter and the brain are themselves an object of thought. Nor, on the other hand, does the sublime spiritual state of Plotinus, who "was ashamed at having a body", solve the problem, but rather reaffirms it. The dualism which is innate in our being remains. If one infallible voice teaches us: "Remember that thou art but dust", another voice, or that very same voice, informs us that in that dust there is, however, a reflection of eternity, a participation in something divine: "God is within us . . .".

Even if we abstain from entering into purely theological arguments and remain within the limits of rational, scientific analysis, it is certain that there exist in the spirit of every man ideas and certainties which transcend the data of the senses and, in contrast with these data, have the character of universality and absoluteness. Such is the idea of being, in general, which is affirmed self-evidently in our consciousness from its first awakening. Nor could it be otherwise, since consciousness is nothing other than awareness of one's own existence and, at the same time, of the reality to which it is opposed, while being also a part of reality. Such are still the notions of space and time which our minds cannot think of except as being limitless; such are the principles of logic, of mathematics and of geometry, which have somehow the character of eternal truths. But beyond that—a thing which is for us still very important—there is in every spirit the certainty, sometimes obscure but nevertheless unfailing and inextinguishable, of freedom, of imputability, of duty and of law *—all notions of a metaphysical character, which have no meaning with respect to the data of the natural world alone, but which suppose contact with the Absolute.

Before considering at length one of these notions, namely, that of law, it will be useful to make an observation on cognitive processes in general. Intellectual activity, even when it is exercised on experimental data, always partakes of something transcendental, because in conceiving these data it necessarily goes beyond them, placing them in a logical order which is virtually inclusive also of other data. Conversely, even when it contemplates eternal ideas, the intellect cannot fail to consider that they are nevertheless reflected in experience, although in a partial and defective manner. So there is a meeting and, as it were, reciprocal references in the various functions of our spirit; it is that which confirms its substantial unity.

If we now turn our attention to law, we easily perceive that

* The Italian word "*diritto*" includes both right and law.

it presents itself to us in a twofold aspect: as an idea innate in our minds, and as an historical or positive fact.

In the first aspect, law is a logical necessity, through which the subjective consciousness understands the subjectivity not only of itself but of another. This may seem something obvious, and hardly worth saying, like all elementary truths; but it has in reality a very profound significance, inasmuch as it denotes the transcendence of the "I", "self" by means of the "I", "self" itself. This is a wonderful rule of our nature, valid as a principle both theoretical and practical. To recognize the personality of another in comparison with our own, and thereby placing the one and the other on the same ideal plane, signifies the virtual admission of a limit and of a correlation in the reciprocal operation, with corresponding rights and obligations on both sides. That this basic scheme of the legal relationship is presented and verified historically in different ways is well known, and we shall discuss it again shortly. But above all it is important to note that this scheme, as a categorical and inexhaustible demand, is immanent in our spirits (*in interiore homine*), and it is from here that it radiates out in a continuous series of relationships between subject and subject. Whence results a certain order in the everlasting stream of human affairs.

Perhaps I may be permitted to recall here a phrase which I heard one day from the lips of a great poet, Gabriele D'Annunzio, when the conversation had turned to the comparison of law and poetry. He remarked, "Even law is a rhythm of life." I believe that we may add that it is a necessary and constant rhythm of the consciousness of individuals and of peoples.

Even when, in the primitive phases of human society, social relations are limited to a restricted group, there are always present the essential elements of that scheme, or, let us say, of that rhythm of the spirit and of life: an affirmation of one's own personality and a recognition of that of others. From this proceeds thence the establishment of a link,—of a transsubjective or *metegoistic* relationship for which we both de-

mand and concede a certain respect (at least, let us repeat, within a given sphere). Little by little, as that *eternal seed of justice* (to use Vico's expression) is developed and social relations are extended, the recognition of the personality of others in comparison with one's own is improved both in depth and in breadth, giving place to institutions which are applied not only to a greater number of persons but also to new forms of activity. Thus there arise new species of subjective rights and of liberty; but, as a correlative, there is an increase of the series of limitations and obligations which are the inseparable coefficients of any legal proposition.

Up to now we have considered the logical universality of law in its purely formal significance. But at this point we must ask ourselves these questions: " Is this consideration the only possible one? Must we be satisfied with recognizing and accepting in that *a priori* form all legal determinations indifferently as if they all had equal value? " That would be equal to a sort of agnosticism, if not actually of scepticism; it means the refusal to hearken to a voice which nevertheless raises itself unconquerably from the very depths of our consciousness—the voice of justice. This assuredly assumes the logical form of law, but, within it, it is affirmed with its own ideal content of absolute value, in comparison with every other possible content, which may present itself in that very same form.

The presence of this " celestial voice " (as Rousseau rightly called it) in our consciousness deserves the most attentive reflection, since it reveals to us, better than does any other datum, the true substance of our being and our supreme mission. Justice understood in its essential significance is not and cannot be anything but the expression of an absolute and eternal law. It is superior, therefore, to changeable positive legality and somehow rooted in our spirit, which for that reason cannot consist entirely in the ephemeral life which enfolds itself in the world of sense, but necessarily belongs to and shares in an order of truth that is not of this world.

Only by considering this participation in a kingdom of absolute values can we comprehend in full the dignity of the human person—that dignity which has its recognition, all too often imperfect, in every legal system to be found in history, but which finds its entire and perfect consecration only in the adherence of mankind to that ideal kingdom which transcends every state.

Man is not, however, (to our sorrow) only spirit. He belongs, as we have said, to two worlds; and hence is born the perennial crisis of our existence, the never completely satisfied longing to ascend from the finite to the infinite. This longing is, on that account, of itself a clear and sure testimony of our true nature. And if the eternal law appears to us to be far too high above our intellect to be entirely comprehended by us, nonetheless it shapes our being after its own fashion and imposes itself on our consciousness as an indefeasable calling, pointing out to us the steep road of duty over the snares of our passions, and indicating the limits of our right in the inviolability of the right of our neighbour.

Thus the eternal law becomes for us natural law, in the most strict significance of this term: "*Lumen rationis naturalis*", according to the words of St. Thomas (*Summa Theologica,* 1a. 2ae, q. 91, art. 2), "*nihil aliud quam impressio divini luminis in nobis.*" (*ib.*) It is also important to note that the *Doctor Angelicus* himself insists on the rational character of this our participation in the eternal law: "*Rationalis creatura participat eam intellectualiter et rationaliter.*" It would be a mistake, in fact, to think that he appeals to faith alone, as it were in antithesis to reason; rather, it is our very same power of reason that lets us, indeed compels us, to recognize that law which, because it corresponds to our nature, truly deserves the name of *lex naturalis.* Thus Thomist doctrine comes very close—although always with its own peculiar theological basis—to the classical theory of the most enlightened Greek and Roman philosophers and jurists, especially those of the Stoic school, in which there was long ago recognized a kind

of prelude or precursor of Christianity. A place is indeed found also in St. Thomas' imposing system for that conception of ὀρθὸς λόγος or *recta ratio* which was magnificently expressed by Cicero in the celebrated passage of his *Republic* (III, 22): "*Est quidem vera lex recta ratio, naturae congruens, diffusa in omnes, constans, sempiterna. . . . Nec erit alia lex Romae, alia Athenis, alia nunc, alia posthac, sed et omnes gentes et omni tempore una lex et sempiterna et immutabilis continebit, unusque erit communis quasi magister et imperator omnium deus.*"

It is well known that this tradition, age-old yet full of life, which is well named the *philosophia perennis,* was challenged by certain schools, especially in the last and the present centuries, in obedience to a narrow historicism or positivism, which perceived only the relativity and not the absolute nature of law. But we can unhesitatingly affirm that not one of the objections adopted by those schools against the idea of natural law was ever demonstrated philosophically. Indeed, modern legal philosophy has demonstrated the groundlessness of those objections. The discussions which have taken place in this connection, on the other hand, have not been without their usefulness, both because they have led us to rectify, not only the mistakes of contending theses, but also some improper expressions of natural law theories themselves, and because they have given us an opportunity for considering better and more fully than in the past that which is really the empirical aspect of law, namely, the element of relativity in it. However, this neither invalidates nor prejudices its unchangeable logical and deontological basis.

Above all, the principle that the human personality, by reason of its rational nature, has a moral and juridical capacity elevating it above physical reality and independent of any external power, has remained unshakably steadfast. That personality is substantially autonomous, since it is master of its own actions, and reflects in itself its own law. The freedom of the human being is thus inalienable, as the attribute of a

rational substance; it constitutes the principle of every right, being logically prior to every particular political union.

This primitive right, which we might call the "right to solitude", because it consists in the innate ability to discover "*in interiore homine*" the motive and the defining condition of every social relationship, is developed into a series of rights which are also natural in their basis, although manifested in various specific forms according to historical circumstances, and sometimes also, in fact, arbitrarily altered and violated. The exigence, in its ethical or deontological sense, remains absolute, however, and with that power which belongs to each one of us to demand respect from others, there goes by inseparable logical necessity the obligation of everyone similarly to respect in others the same exigence.

To recognize in oneself and in every other person the reflection of the same spirit, and thus the subordination to the same law, means the admission of the bond of brotherhood between all men; that is that *societas humani generis* of which a glimpse was caught by ancient Philosophy, and which had its most illuminating affirmation in the Gospel.

Hence we perceive how justice, in its highest expression, is joined and almost identified with charity, because it also is a form of love; and it differs from it only because it defines the balance and the conditions of human relationships. The spiritual essence of the personality, sharing in the Absolute because of its nature, is the supreme value which is affirmed, in different but consistent forms, by law as well as by morals.

In this principle, which is simple in its abstract formulation but rich in its numberless consequences, we have the criterion for appreciating the degree of justice in existing laws, which are the product of human intellect and also of human passions. We cannot attribute *a priori* to these laws the character of perfect justice, because this same intellect is fallible, and the difficulties of applying that absolute principle rightly to changing circumstances are such that the purest of intentions can be led into error. But the errors are especially serious

(as history both ancient and modern shows us) when lust for dominion or other disordered passions make men's minds leave the path of that ideal principle which ought to be a guide to positive acts of legislation. And so the elementary rights of the individual are often not only neglected but are also deliberately violated by those very people who ought to safeguard them.

No law "*ab hominibus inventa*" can, however, abolish that which is innate in our nature. The aberrations of human judgment can violate that law, but they cannot destroy the ideal value which remains intact, beyond the reach of any possible violation. The foolish presumptions of those princes or governors who, on acceding to the supreme power in their states, considered themselves freed from every bond and every obligation, and who imposed their wills as absolute law, of necessity came into collision with the conscience of their peoples, which never lost much time in rousing itself in the name of a higher and truer law. Then history itself, if we examine it closely, contradicts the assumptions of those schools which, deaf to the dictates of the everlasting Philosophy, confused and sometimes still confuse legitimate authority with *de facto* power, proclaiming that the State, however constituted, is the sole fountain of every right.

No one contests, as we have already indicated, that there is a relative and changeable element in law as it has existed in history and in positive enactments. It is also well known that modern research has brought this element into particular relief, by demonstrating the necessary connections of the legal phenomenon with other phenomena of social life. It was on this point that, for example, the great jurist Joseph Kohler (of whom I have the honour to be a pupil) insisted in his various writings, among which it will suffice to recall the work with the significant title, Law as a Phenomenon of Culture. "*Jedes Kulturleben hat sein besonderes Recht, und jedes Recht wieder sein besonderes Kulturleben—ganz ebenso wie jede Kulturwelt ihre Kunst und ihre Oekonomik hat*".[1] He

[1] J. Kohler, *Das Recht als Kulturerscheinung*, Würzburg, 1885, p. 5.

cited as examples Roman law, Islamic law and Hindu law, each of which is incomprehensible without reference to the character and to the spirit peculiar to the societies in which they respectively arose and flourished. These and other analogous considerations (e.g., with regard to the connections between legal institutions and economic conditions of life) have today penetrated into the common consciousness of scholars to such an extent as to need no further demonstration.

The problem is not now whether we must admit an element of relativity in law as an historical and positive fact. But assuredly it is whether beyond that there does not exist yet another element, or rather, we might say, two others, namely, an unchanging logical form and a supreme ideal, itself also unchanging, of law itself. That we must answer such a question in the affirmative follows from what has been said.

It would be quite a mistake to suppose that these different considerations, although distinct, are mutually incompatible. The truth is rather that they are complementary. If sometimes the conclusion was, wrongly, that the one consideration excluded the other or others, that happened rather in the case of the historicists or positivists, many of whom denied the logical and ethical universality of law, admitting and observing only its empirical aspect. On the other hand, those who fixed their attention even in ancient times on that universality, observing the eternal idea of justice, did not fail to consider explicitly, albeit summarily, also its accidental manifestations in the order of phenomena.

The taunt of " lack of historical sense " with which it is customary to upbraid the supporters of natural law may be justified in some cases, but certainly not in all. It would suffice to recall, for example, the observations of Plato and Aristotle on the various vicissitudes of laws and political constitutions, and on the necessity that they should correspond with the divers circumstances of time and place. But, not to dwell on such references, we should like at least to glance at the scholastic doctrine on this subject at is appears especially in the system of St. Thomas. Moving from the precise conception

that law is a "*regula et mensura*", "*directiva humanorum actuum*", Aquinas notes that the great variety of human affairs causes that the common principles of the law of nature cannot be applied to all such affairs in an equal manner; hence he derives the diversity of positive laws (1a 2ae, q. 95, art. 2). These principles remain in themselves immutable; but from their analysis we can draw logical conclusions which also belong to natural law; moreover, they admit of particular decisions, "*secundum quod quaelibet civitas aliquid sibi accommode determinat.*" (*ib.* art. 4.) With this, we see, there is ample recognition of the relativity which is a peculiarity of human laws. These must be adapted, "*et secundum personas, et secundum negotia, et secundum tempora*" (q. 96, art. 1). Although they must always be directed towards the common good, they may justly be modified "*propter mutationem conditionum hominum, quibus secundum diversas eorum conditiones diversa expediunt*" (q. 97, art. 1). Thus may be established special rules ("*specialia quaedam jura*") for the different classes of the population, according to their respective activities, e.g. for priests, for soldiers, etc. (q. 95, art. 4).

The strictness of general principles does not therefore exclude their adaptability to particular materials and cases. In this sense, in the footsteps of Aquinas, Dante observed that various nations because of the diversity in their conditions of life, must be ruled by different laws, for the very reason that law is the "*regula directiva vitae*".[2]

It has been rightly remarked that we do not exactly change a law when by reason of a change in its matter we define its significance with greater precision so as to exclude its application to an object different from that which it was really intended to regulate.[3] Nor can we speak of change when we add

[2] Dante, *Monarchia*, I, 14 (16).

[3] "Ex his patet quod lex ipsa non proprie mutetur, sed illius mutatio fit per mutationem materiae, ita ut materia quae est objectum legis mutetur ac proinde desinat esse ejus objectum" (Comment on the Summa Theol. of St. Thomas by De Rubeis, Billuart etc., ed. Marietti, Vol. II, 1940, p. 538). See

to a law something that goes beyond, but not against, its prescriptions. Thus St. Thomas recognizes that to *lex naturalis* itself "*multa superaddita sunt ad humanam vitam utilia tam per legem divinam, quam etiam per leges humanas*" (1a 2ae, q. 94, art. 5); and he likewise admits that certain precepts, although derived from the *lex naturalis,* may cease to have force when special causes prevent their observance.[4]

The differences noted in various legislative systems, and also in the successive phases in the same system, are sometimes only apparent, and at any rate concern much more their accessory and superficial parts than their deep roots. It is indubitable that the fundamental motives of the human mind from which the rules of law proceed, are at least for the greatest part uniform and constant. It is assuredly also certain that the same motive may be translated into formulae which are quite different and even antithetical, since it must render itself valid in totally disparate circumstances. The protection of individual lives (to quote the best known example in this connection) in the phases prior to organized States can happen only by means of the vendetta of the family group; which is thus deemed lawful and a matter of duty; while, when that protection is assumed by the State, it becomes a crime. But the intention remains substantially the same. If, to mention another example, we look at the sanctions against the violation of contractual obligations in various systems and historical periods, we perceive that they are defined in a thousand different ways, sometimes also incongruous and cruel; but they do answer always to the fundamental conception that agreements must be maintained.

The variation between the maxims of natural law and posi-

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also the observations of Suarez, *De Legibus ac Deo Legislatore,* Bk. II, Ch. XIII, 3-5; cf. the recent study by A. Truyol y Serra, "Lo mutable y lo inmutable en la moral y el derecho según F. Suarez" in *Boletim da Faculdade de Direito,* Coimbra, Vol. XXVII (1951), pp. 228-251.

[4] *Loc. cit.* Cf. A. Bonucci, *La derogabilità del diritto naturale nella Scolastica,* Perugia, 1906; A. Messineo, "Il diritto naturale e la sua immutabilità e assolutezza, in *Civiltà cattolica,* year 83, 1932, Vol. IV, p. 417-431.

tive legal rules does not depend however only on the greater generalisation of the former in comparison with the specific peculiarities of the latter, which are more closely bound up with individual circumstances; it depends also on the manifold deviations to which the human spirit is subject, as we have indicated a short while ago, both by the effect of weakness or ignorance, and by the prevalence of various passions over pure reason. The history of positive law abounds, alas, not only in technical imperfections but also in ethical aberrations, sometimes of an extremely serious nature; for it tells of violations of justice which do not cease to be such merely because they are cloaked in a mantle of legality. Yet even these aberrations are, of course, historically explicable, since every event must have a cause, including pathological phenomena, which are observed as much in the world of nature as in the world of history, and in particular of legal history. If, however, on the one hand, we must enquire into the causes of these phenomena, it is our duty, on the other hand, to declare their anomalous nature. Thus the legal scholar, who does not wish to be a mere exponent or slavish instrument of the legislators' authority, when investigating and applying positive legal rules, cannot be excused from raising his gaze to the ideal state of the *ratio juris* in its universality, comparing thereby positive law with natural law. Such a comparison will help not a little in this judicial interpretation itself, since it is precisely the function of the judge to use his utmost power to extract from the letter of the law the greatest amount of justice. But it will also lead to a recognition of the defects of the rules in force, and will prepare and suggest, directly or indirectly, with or without formal proposals, necessary reforms.

Everyone knows that the life of the law gains its substance from a continuous struggle against wrong. But what perhaps is usually forgotten is the fact that the gravest offences against justice happened not so much in opposition to the laws as through these very laws. Thus, not only in ancient times but also in recent ones, the laws of some States have

trampled on and infringed upon the essential rights of the human personality, even after these had been solemnly proclaimed and guaranteed by the Constitutions of these same States. Even the principle of the equality of citizens before the law, unanimously recognized as fundamental in the modern State, has often been violated in legal form. It is of course true that the healthy conscience of all peoples rose up against laws so manifestly inequitable, as it always happens when arbitrary commands are opposed to natural law, since no capricious judgment can quench the voice which emanates from nature, and no tyranny can overcome the spirit in that which partakes of the absolute and eternally valid. It is also true that for that very reason the laws to which we allude have been successively abrogated. But too many facts clearly demonstrate that justice is even now very far from having set up its kingdom on earth. Thus notwithstanding the polemic efforts renewed lately by the so-called "pure theory of law", the classical antithesis between the φύσει δίκαιον and the θέσει δίκαιον, that is, between natural law and that law *ab hominibus inventa,* remains valid: with it goes the categorical obligation which is its consequence, to defend the former in its conflicts with the latter.

To us it is not given to know if these conflicts will one day come to an end, if the eternal demands of justice will be faithfully translated into positive ordinances, and if these ordinances will be respected by all and not transgressed. But even supposing and hoping that this state of perfection may be realized in the future, shall we have to conclude perhaps that, on such an hypothesis, law would have exhausted its function and would disappear from the world? It has seemed so to some authors; but it is not hard to see the mistake of such an argument. An eminent French jurist, Lévy-Ullmann, moving from the fairly obvious observation that the great majority of human beings obeys certain precepts, and abstains, for example, from killing, "par pur respect de la loi morale et non pas par craintive soumission aux règles juridiques," ex-

presses the opinion that, if we came, as is to be hoped, to an "ère sans violence" it "serait nécessairement, par definition, *une ère sans lois.*" [5] In order to agree with this opinion, it would be necessary to admit that a law exists only when it is in fact transgressed. But the truth is that a law, moral or juridical, denotes a perfectly valid demand even when it is respected spontaneously; in that case, the sanction implied in it (that is, in the case of a juridical law, the prevention of wrong) remains a mere *potentiality,* opposed to an hypothetical violation which is itself, in the abstract, always possible.

The origin of that error lies in not having understood exactly the true relationship between morality and law, namely, the parallelism between these two ethical categories, which have an identical foundation, but distinct forms, because they give a rule, respectively, to each subject taken on its own, and to the relations between several subjects. An absorption of law in morality, or, as Lévy-Ullmann expresses himself, an "identification complète de la morale et du droit" [6] is in fact impossible, so long as human life and society exists in which there will always have to be defined the limit of that which is lawful to each individual in relation to others.

Analogous from a certain point of view, and in my opinion equally unacceptable, is the opinion recently expressed by a distinguished Italian jurist, Carnelutti: "If it is not dead, law will die, because it is mortal".[7] "Death", he writes, "is the fate of insufficiency. Now the insufficiency of positive law is discovered in the fact of natural law." [8] But also natural law, he affirms, is insufficient. It "prescribes that which must not be done, but such a prescription is not enough to establish peace between men." "To be sufficient, law, positive or natu-

[5] H. Lévy-Ullmann, *Préface* to Del Vecchio, *Justice, Droit, État,* (Paris, 1938), page XXX.

[6] *Loc. cit.*

[7] F.Carnelutti, *La morte del diritto,* in the collection *La crisi del diritto,* (Padua, 1953), p. 183.

[8] *Id.* p. 184.

ral, ought to be no longer law ".[9] " The equiparation of others to ourselves is, beyond every possibility of law, in the field of ethics, which is the kingdom of love." " Law, in truth, is made only for average men: the good do not need it, and the bad have no fear of it ".[10]

To refute these assertions in detail would be, here at least, superfluous, also because we do not think that they have won nor are likely to win much agreement. The thing that often leads jurists to lose sight of the truly essential characteristics of law is the fact that the normal course of legal life arouses in them less interest than do the pathological or *exceptional* accidents occurring in that life. The fact that the greater proportion of debtors fulfil their obligations without their creditors' having to summon them to court, or that family relationships (e.g. the duty of parents to educate their offspring) do not require except in very rare occasions, the intervention of judges and advocates, or in short, that law is above all a peaceful co-ordination, a balancing principle, and a criterion regulating social life for all (and not only for the " average man ") [11] is a truth so elementary that it seems even otiose to note it. But for precisely that reason it runs the risk of being overlooked by one who considers the periodic changes of law rather than its immanent and profound reality.

Nor is it exact to say that law imposes only negative obligations. It dominates our entire lives, being closely conjoined with morality. Its commands concern, beside abstention from wrong, also services due to others, including certain obligations to provide assistance. It is quite true that it is of itself insufficient to direct our actions, for it must be integrated with morality. But it is equally true that morality of itself is not

[9] *Id.* p. 185 et seq.

[10] *Id.* p. 189 et seq.

[11] We may recall the beautiful formulation of the Stoic Chrysippus, reported in Roman sources: " Lex est omnium divinarum et humanarum rerum regina. Oportet autem eam esse praesidem et bonis et malis, et principem et ducem esse; et secundum hoc regulam esse iustorum et iniustorum, et eorum, quae natura civilia sunt, animantium, praeceptricem quidem faciendorum, prohibitricem autem non faciendorum " (Dig. I, 3, fr. 2).

enough, and it likewise must be integrated with law.[12] This fact, however, can never be eliminated, not even if we arrive at a state in which love reigns supreme, and in which no rule is ever transgressed. The ethical imperative, in both its forms, is ever valid so long as there exist beings to which it gives a norm; and, let us repeat, the belief that it begins to have validity only when a violation of it takes place or is threatened is an absurdity.

As an exigence peculiar to human nature, law wells up inexhaustibly from our conscience, which, in ever changing circumstances, perpetually lays before us the petition for a recognition of the subjectivity which belongs to it, and for a coördination of that subjectivity with that of our neighbour. Although the manifestations of this fundamental motive are various and often imperfect, it is of the highest significance that it accompanies human life without fail in its every phase. Never has there been found trace of an historical era—I would almost say prehistoric too—where there lacked a complex of norms regulating the relationships of communal life—norms imposed and observed even without any written formulation by the common public conscience, which is not, and cannot be, other than the outcome of the data of individual consciences. *Ubi homo, ibi societas; ubi societas, ibi jus.* To abolish law, it would be necessary to abolish mankind.

But not everything which comes into the generic scheme of juridicity answers perfectly to the inner call of conscience. The latter may be more or less developed and enlightened, and

[12] E.g. Rightly St. Augustine will tell us that we could not remit a debt unless we know we had the right to exact it. "Neque enim debita dimitteremus, nisi quid nobis deberetur Lege indice disceremus." (*Quaest. in Heptateuchum,* Bk. II, question 80). Thus (he went on to note) it would not be lawful to do acts of charity with something stolen from others: "Quis est qui dicat: ut habeamus quod demus pauperibus, faciamus furta divitibus?" (*Contra mendacium ad Consentium,* Ch. VII, para. 18). The story is well known, and was recently retold with spirit, about the pickpocket who went to a service and was so moved by the preacher's eloquence that he emptied all the pockets of the people near to him and put the contents in the alms box (see R. Pound, "*Sulle condizioni attuali della Filosofia e della Scienza del diritto,*" in *Riv. internaz. di Filosofia del diritto,* 28th Year, 1951, Fasc. III, p. 482-483).

may indeed suffer, as we have noted, deviations and mistakes which appear especially serious when translated into positive legal orders. Thus the deontological search for true, supreme justice rises above that for juridicity understood generically. In the very depths of our consciousness, in the light of right reason, we find the imprint of that absolute law which by far surpasses in truth and value the laws created by human caprice and human passions. It is precisely this law which the everlasting philosophy, in conformity with the classical tradition, called the law of nature. Recognizing in it the reflection of that eternal or divine law, Aquinas did not hesitate to affirm that human laws cease to be obligatory "*in foro conscientiae*", whenever they are contrary to divine law[13]—an argument all the more noteworthy inasmuch as it is accompanied by the assertion of the deference owed as a matter of principle to positive law. Not only just laws must as a rule be carried out, but also those which are unjust and contrary to public utility, provided that their injustice does not go so far as to violate the essential principles of the supreme ethical order, indelibly and categorically impressed on our spirits. The positive social order has of itself a value as a partial realization of that order; but it may not infringe nor repudiate that order without destroying the basis of its very value and thereby annulling its authority. Thus, exactly, wrote Suarez: "*Jus naturale est fundamentum humani juris; ergo non potest jus humanum juri naturali derogare, alias suum fundamentum destrueret, et consequenter seipsum*".[14]

It is the function of legislators to correct unjust and harmful laws, reforming them and whenever the occasion arises granting dispensation from their observance. And it is the function of judges to apply laws to the peculiar facts arising in individual cases (which may not have been foreseen by the legislators), in such wise as to temper their harshnesses and incongruities, following rather their spirit than their letter,

[13] See St. Thomas, *Summa Theol.*, 1a 2ae, q. 96, art. 4.

[14] Suarez, *De legibus ac Deo legislatore*, Bk. II, Ch. XIV, 5.

having regard also to those *general principles* which the legislators themselves are bound to admit as an integrating source. The assistance which techniques of interpretation offer in this connection are much wider and more powerful than they may seem to the layman. How much such instruments, if well handled, avail really to eliminate injustices and to promote the progressive development of the laws which are in force, is known to every trained jurist and is demonstrated adequately by the unrivalled example of Roman jurisprudence.

On the stability of the legal order depends the security of civil society in all its manifestations; it is not therefore admissible that the norms of which it is formed, even if defective, may be transgressed for mere individual caprice. Hence the maxim, declared and practised by Socrates in a manner sublime, that the good citizen must obey even unjust laws and sentences, even to the point of sacrificing himself, rather than give to others the bad example of insubordination to one's native State. But this is valid only up to a certain point beyond which the authority of any State does not go, no matter what may be its power; since above the written laws there are those which are not written and which correspond to the insuppressible and immutable demands of human consciences. If we try to stifle them with violence, such demands revive and are expressed with that cry which long ago broke from the lips of Antigone in Greek tragedy, and which has always raised itself as a last appeal to divine justice, whenever human justice, in contempt of the divine, has become *justitia diaboli,* and dragged to martyrdom its innocent victims.

We know it well: there always has been some legal order since human life existed, because (need I repeat?) man is essentially social, and there cannot be any society without law. But that does not signify that it is granted to our minds only to submit to and to obey passively, in any case whatever, the orders of the preponderant social power. Anyone who does affirm this is refusing to recognize not only the autonomy peculiar to the human conscience, but also the fact that the

positive law itself requires of its subjects, and especially of its magistrates, for the real efficiency of its institutions, an active and not merely a passive cooperation. Without this, these same institutions would dry up and decay, just as a plant deprived of the life-giving sap withers and dies. To take the extreme case, where the positive rules are such as not to admit of the magistrates' granting, and of the citizens' obtaining, at least a certain justice which respects and protects the essential rights of the person, it is the duty of the magistrate with an upright conscience to renounce his office, and it is lawful, if not for an individual, then to the sound part of the people to oppose the authority which usurps power and to substitute a new order for that one which is rather a negation than an affirmation of justice.[15]

However, we must not pass over in silence the fact that, if the general sense of these maxims is clear enough, not a few difficulties are presented when we deal with their practical application. That there are many problems and dangers of mistakes in this matter is made clear not only by doctrinal doubts and disputes, but also by numerous experiences both ancient and modern. For example, it must be noted that attempts to overthrow a tyranny, whenever they fail, usually provoke a harshening of that tyranny; while even if they succeed, they may have unfortunate results, giving way to serious quarrels within the people and sometimes also to the rise of a new and

[15] St. Thomas himself declares that against the excesses of tyranny resistance is legitimate, except if damage derived from this is greater than the tyranny, or if the suffering of this hurt is for a people a just expiation of its sins. In that case, the remedy must be sought in the termination of those sins. But, in principle, the struggle against a tyrannical regime does not properly constitute sedition: "Magis autem tyrannus seditiosus est" (*Summa Theol.*, 2a 2ae, q. 42, art. 2, ad 3; *ib.*, q. 104, art. 6 ad 3; *De regimine principum*, Bk. 1, Ch. VI). In this same sense, the Encyclicals "*Quod Apostolici muneris*" and "*Diuturnum illud*" of Pope Leo XIII advise that the subjects' duty of obedience ceases, "si legislatorum ac principum placita aliquid sanciverint aut iusserint, quod divinae aut naturali legi repugnet"; "omnia enim, in quibus naturae lex vel Dei voluntas violatur, aeque nefas est imperare et facere."

worse tyranny.[16] Above all, we must not forget that opposition to the laws in force, itself a very serious fact, may be and is most often suggested not by obedience to a higher justice but by selfish anti-social motives. Hence the need for a rigorous criticism in order to ascertain if in the concrete circumstances there appear those extremes which may rationally justify disobedience or not, taking into account also its presumable results. In principle, we must exclude, for the reason stated above, individual acts of resistance to authority, even if motivated by irreproachable intentions, when they do not find in the people's conscience an approval adequate to make success likely.

The fact of revolution is without doubt in a certain sense unlawful. But inasmuch as it tends to set up a new law it must be regarded also in this aspect. And it is not helpful that jurists veil their faces before it because of a sort of "pudeur doctrinaire", as Gény wittily observed.[17] Certainly not every revolution must be judged rationally as legitimate; but no less would a summary condemnation of revolutions in general be admissible. Distinctions must be made, according to the criteria indicated above.

Sudden changes of political regimes represent the acme of that crisis which almost always accompanies the historical life of the law, and which ordinarily finds its gradual solution in the slow evolution of the public conscience and in the normal activity of legislative organs. However, not only in those events of an extraordinary character, but most certainly also in the common proceedings of reformatory innovations, there is revealed the perpetual travail of the human mind concerning law. Judicial activity itself, which has a basis that is apparently fixed in the *jus conditum,* gives rise, as is known, to ever new problems. Throughout all its continual vicissitudes, law thus reaffirms itself, without repose, equal and yet diverse,

[16] See on this especially the treatise *De regimine principum, loc. cit.*

[17] *Science et technique en droit privé positif,* Bk. IV, (Paris, 1924), p. 132.

just as the sun, in Horace's words, is reborn every day, "*alius-que et idem*".[18]

And so we have pointed out, in rapid synthesis, the unchanging foundation of law and its accidental but yet necessary manifestations in the historical field. It would certainly be a mistake to neglect the study of these manifestations. But it would be no less mistaken to limit our consideration to such study while excluding that of the universal logical category and of the eternal idea of law or of justice κατ' ἐξοχήν, which shines at the summit of our consciences, and imposes itself on these as absolutely valid, beyond and above positive legal decisions and their possible mistakes.

Law, we all know, is order. But not every and any order answers to the demands of justice. This is established in full only when love reigns with that order. Hence it may be defined precisely as "*ordo amoris*", as St. Augustine said of virtue.[19] Both fundamental forms of Ethics, Morals and Law, come to a head indeed in one sole principle, namely, the universality of the spirit. As Pope Pius XII has taught already, in an unforgotten message, "neither contrast nor alternative: love or law, but the fruitful synthesis, love and law."

Certain it is that in our brief life on earth we cannot sate our thirst for justice. But in this same thirst, in this inextinguishable aspiration is revealed our superior destiny and rests our hope in eternal peace and blessedness.

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(Transl. by H. Mck. Henderson)

[18] *Carmen saeculare*, v. 10.

[19] *De Civitate Dei*, XV, 22.

FORCE AND FEAR INVALIDATING MARRIAGE ROTA DECISIONS 1940-1946

(Vol. XXXII, an. MDCCCCXLIX—Vol. XXXVIII, an. MDCCCCLVI)

Section I

General Observations

Canon 1087 of the Code of Canon Law is as follows:—

> § 1. Invalidum quoque est matrimonium initum ob vim vel metum gravem ab extrinseco et iniuste incussum a quo ut quis se liberet, eligere cogatur matrimonium. § 2. Nullus alius metus, etiamsi det causam contractui, matrimonii nullitatem secumfert.

In 1950 the Catholic University of America Press published the doctoral dissertation of the present writer entitled *Force and Fear as Invalidating Marriage: The Element of Injustice* (Canon Law Studies, No. 310).[1] This dissertation attempted an analysis of the doctrinal development and jurisprudence on force and fear as invalidating marriage, through the year 1949. This study included the Rota Decisions handed down for the year 1939 and available to the general public in 1949. The present paper takes up from that point, namely with the Decisions handed down in 1940 (available to the general public in 1950) and covers all Decisions available when work was begun on the present paper, namely the Decisions handed down in 1946, and available to the general public in 1956. The official *Decisiones* published by the Vatican Press have been used.

* Discourse delivered by the Right Reverend Msgr. Josiah G. Chatham, S.T.L., J.C.D., Synodal Judge, Diocese of Natchez-Jackson, at the nineteenth National Convention of The Canon Law Society of America held at the Adolphus Hotel, Dallas, Texas, October 15-17, 1957.

[1] Hereafter cited: Chatham.

No attempt has been made to include isolated cases published in canonical or theological journals.[2]

During the period 1940-1946, the Rota handed down 558 Decisions in all types of cases. Of these 247 dealt with force and fear as invalidating marriage. In other words, 43 per cent of all Rota cases were force and fear cases. Of the 247 force and fear Decisions, 110 were *Constat de nullitate;* 137 were *Non constat.* Of the 247 force and fear cases, 50 dealt with marriages contracted before the effective date of the Code of Canon Law; [3] 8 dealt with cases governed by the law of one or the other of the Oriental Rites; [4] in one of the Oriental

[2] *Sacrae Romanae Rotae Decisiones seu Sententiae quae prodierunt* 1940-1946 (Romae: Typis Polyglotis Vaticanis, MDCCCCXLIX-MDCCCCLVI). The Decisions are quoted so frequently in this paper that it seems desirable to avoid repetition. The following method will be used:—a) volume number; b) in parentheses, year of the Decision; c) number of the Decision; d) name of the *Ponens;* e) page number; f) paragraph number. *Sic:* Vol. XXXII (1940), Dec. I, Grazioli, p. 3, n. 3.

[3] Vol. XXXII (1940): Dec. XVIII, Quattrocolo; Dec. XXVII, Janasik; Dec. XXXVII, Wynen; Dec. XLVI, Teodori; Dec. XLVII, Heard; Dec. LX, Canestri; Dec. LXIII, Jullien; Dec. LXV, Canestri; Dec. LXVI, Heard; Dec. LXVII, Quattrocolo; Dec. LXXII, Canestri; Dec. LXXIV, Quattrocolo; Dec. LXXIX, Heard.

Vol. XXXIII (1941): Dec. VI, Janasik; Dec. XXIII, Wynen; Dec. XXIV, Quattrocolo; Dec. XXV, Pecorari; Dec. XXIX, Heard; Dec. XXXVI, Jullien; Dec. LIII, Caiazzo; Dec. LXXI, Wynen; Dec. LXXV, Quattrocolo; Dec. LXXXIV, Caiazzo.

Vol. XXXIV (1942): Dec. II, Pecorari; Dec. XXXIV, Caiazzo; Dec. XXXVI, Canestri; Dec. XLII, Janasik; Dec. XLIII, Wynen; Dec. LI, Caiazzo; Dec. LIV, Janasik; Dec. LXXV, Canestri.

Vol. XXXV (1943): Dec. XI, Caiazzo; Dec. XII, Grazioli; Dec. XVI, Canestri; Dec. XXIX, Canestri; Dec. LVI, Canestri; Dec. LXXV, Canestri.

Vol. XXXVI (1944): Dec. IV, Canestri; Dec. XXVIII, Roberti; Dec. XXXI, Heard; Dec. XL, Grazioli; Dec. LXII, Heard.

Vol. XXXVII (1945): Dec. VII, Canestri; Dec. XVII, Jullien; Dec. LII, Roberti; Dec. LIII, Heard; Dec. LIV, Brennan; Dec. LXIII, Fidecicchi; Dec. LXXXI, Wynen.

Vol. XXXVIII (1946): Dec. XXI, Pecorari.

[4] Vol. XXXII (1940): Dec. XXXI, Grazioli; Dec. LXVIII, Wynen.

Vol. XXXIII (1941): Dec. XXIV, Quattrocolo; Dec. XXIX, Heard.

Vol. XXXV (1943): Dec. XIX, Canestri; Dec. LXXVII, Pecorari.

Vol. XXXVI (1944): Dec. XXXI, Heard. Vol. XXXVIII (1946): Dec. IV, Roberti.

cases, the parties were Orthodox, yet the Rota ruled that the marriage was subject to the law of the Catholic Church on force and fear as invalidating marriage.[5] Pre-Code and Oriental cases are listed in footnotes 3 and 4 for convenient reference.

Before beginning a systematic analysis of the jurisprudence of the Rota on Canon 1087, a few random observations gleaned from 247 cases may be of interest. The shortest case is four pages; [6] the longest is twenty-seven pages; [7] the average length of a case is about ten pages. In the long decision just mentioned, the Rota notes that force and fear cases are sometimes fabricated, and lists all the clichés that turn up in such cases. The listing is a classic of irony and detail.[8] A note of fatigue appears when the Rota observes that thirty-two witnesses were heard in one case,[9] twenty-five in another,[10] and twenty-eight in a third.[11] Such multiplication of witnesses is clearly exceptional and does not elicit enthusiasm. Father Culver Alford is quoted during this period, and this may be the first time an American author was quoted by the Rota.[12] Monsignor Francis Brennan appears for the first time as an *Auditor* [13] and later as *Ponens*.[14]

Canon 1087 is the cloak and dagger department of the *Decisiones*. The Court speaks of: "*Siculi quibus stuprum non luitur nisi matrimonio aut morte . . .*"; [15] and there is talk of the "black hand" in the testimony of witnesses: "*è costretto*

[5] Vol. XXXII (1940), Dec. LXVIII, Wynen.

[6] Vol. XXXVII (1945): Dec. VI, Teodori, pp. 39-43; Dec. LIII, Heard, pp. 476-479; Vol. XXXVIII (1946), Dec. XLI, Heard, pp. 407-411.

[7] Vol. XXXVI (1944), Dec. XIX, Canestri.

[8] *Dec. cit.*, p. 200, n. 3.

[9] Vol. XXXII (1940), Dec. XXXII, Jullien, p. 345, n. 4.

[10] Vol. XXXIII (1941), Dec. XXXI, Pecorari, p. 337, n. 7.

[11] Vol. XXXV (1943), Dec. LXXXVIII, Caiazzo, p. 1014, n. 7.

[12] Vol. XXXIII (1941), Dec. XLVII, Janasik, p. 517, n. 3.

[13] Vol. XXXIII (1941), Dec. LXXVIII, Roberti, p. 850 (a simulation case).

[14] Vol. XXXVII (1945), Dec. LIV, Brennan, pp. 480-490.

[15] Vol. XXXII (1940), Dec. XXXII, Jullien, p. 352, n. 8.

con la minaccia della mano nera." [16] Selfish parents appear in most cases of reverential fear; the veracity of *sacerdotes*, testifying under oath, is often called into question; [17] the impact of Fascism, Communism and World War II is seen frequently during the period 1940-1946; there are sad stories of rape, seduction, lies, intimidation, guns, police and jails. Many European cases involve parties preparing to leave for, or just returning from America. The Rota deals calmly with the delicate situation in which key witnesses withdraw their testimony, even by anonymous letter and after two *Constat* Decisions.[18]

Many foibles and facets of human nature turn up in force and fear cases. In one case, a young lady in a convent school wished to be a nun; her mother took her out of school and advertized for a husband: "*Signora distinta per motivi di famiglia desidera sposare figlia bella e giovanissima.*" [19] In another case, a reluctant bride-to-be was assigned the duty of teaching her future husband how to write: "*invitata ad impertienda ei rudimenta recte scribendi, 'relationes . . . frigidae et caeremoniales erant'.*" [20] Interesting variations of Italian are found in the testimony of witnesses, for example: "*mentre io stavo prendendo il* breakfast." [21] One even finds a tragic humor at times, as when perjury is justified because a certain witness was swearing through her glove: "*si è giustificata col dire che aveva giurato sul Vangelo, toccando col guanto.*" [22]

Time has little to do, necessarily, with the outcome of a case. The Rota observes: "*tot causae etiam post plures an-*

[16] Vol. XXXVII (1945), Dec. LII, Roberti, p. 475, n. 1.

[17] E.g. Vol. XXXIV (1942), Dec. LII, Pecorari, p. 569, n. 3; Vol. XXXVIII (1946), Dec. V, Fidecicchi, p. 64, n. 9.

[18] Vol. XXXV (1943), Dec. LXXXVIII, Caiazzo, p. 959, n. 2; Vol. XXXVII (1945), Dec. IX, Fidecicchi, p. 66, n. 2.

[19] Vol. XXXII (1940), Dec. LXVII, Quattrocolo, p. 733, n. 1.

[20] Vol. XXXIV (1942), Dec. V, Janasik, p. 49, n. 4.

[21] Vol. XXXVI (1944), Dec. XVII, Pecorari, p. 182, n. 7.

[22] Vol. XXXVI (1944), Dec. XXVI, Pecorari, p. 288, n. 4.

nos et post prolem generatam, admissae et decisae sunt." [23] Specific examples are: a marriage that lasted twenty years and produced two children; [24] another marriage lasted twelve years; [25] and, in yet another case, twenty-nine years intervened between the celebration of marriage and the proposal of the case in the court of first instance.[26] Philosophically, the Rota explains: *" Si constat filium e metu matrimonium iniisse, non refert quod postea rem factam acceptaverit vitamque coniugalem meliore quo potuit modo toleravit. . . ."* [27] In a similar vein, it is explained that consummation does not necessarily show freedom from fear at the time of the marriage: *" Id enim tantum ostendit Clementinam . . . persuasum sibi habuisse se iam ad reddendum debitum, ex iustitia, teneri; ideoque id normaliter praestitisse."* [28] At the other extreme, in what may be a record of prompt adjudication, a certain marriage was contracted on October 6, 1941, and three years later on November 22, 1944, the Rota gave a *Constat* Decision which was *facta executiva.*[29]

Anything can be expected in Rota cases, as for example, when, after three *Non constat* Decisions, the Rota gives two *Constat* Decisions for a final settlement favorable to the petitioner.[30] And in another instance, a *Turnus* demolishes the case, considers it a fabrication with spurious letters and efforts to keep a priest from testifying by a false claim of the sacramental seal,[31] only to have the Decision reversed by a subsequent *Turnus.*[32]

[23] Vol. XXXIV (1942), Dec. XXXVI, Canestri, p. 361, n. 2.

[24] Vol. XXXVI (1944), Dec. XL, Grazioli, p. 452, n. 1.

[25] Vol. XXXVII (1945), Dec. XXXV, Wynen.

[26] Vol. XXXVIII (1946), Dec. XXI, Pecorari. See also Dec. XLI, Pecorari.

[27] Vol. XXXVI (1944), Dec. XVIII, Heard, p. 191, n. 2.

[28] Vol. XXXVIII (1946), Dec. VI, Pecorari, p. 77, n. 15.

[29] Vol. XXXVI (1944), Dec. LXI, Pecorari.

[30] Vol. XXXIV (1942), Dec. XLVII, Wynen, p. 515, n. 20.

[31] Vol. XXXVI (1944), Dec. XLIII, Jullien.

[32] Vol. XXXVII (1945), Dec. XLV, Fidecicchi, pp. 413-421.

In the midst of this apparent confusion, the Rota shares its wisdom with the lower courts:

a) Magis quidem facienda est depositio illius qui metum passus est, ut auctores dicunt.[33]

b) Magis credi duobus testibus de metu deponentibus quam mille testantibus spontaneam voluntatem.[34]

c) Dicitur etiam actrix alium amasse, ut in causis ex capite metus iam fere semper dicitur. Argumentum nonnisi magna cautela accipi potest, cum fere omnis puella . . . iuvenes sibi amorem afferentes invenerit . . . sed raro eis tenaciter adhaeret.[35]

d) Love often turns to aversion after a girl has lost her virginity to a man.[36]

e) Extra-judicial affidavits, even when sworn, frequently will not stand up when a witness is questioned in court.[37]

f) Letters of recommendation from the pastor of parties and witnesses are of great importance.[38]

g) Certain exaggerations are to be expected in *metus* cases, but these need not detract substantially from the credibility of parties or witnesses.[39]

h) Flight or seriously attempted flight settles many difficulties in determining the existence of grave fear.[40]

i) . . . reprobetur oportet agendi modus quo Iudices, metus dimetiendi causa, praeconstituunt regulas quasdam ita definitas

[33] Vol. XXXIV (1942), Dec. II, Pecorari, p. 21, n. 2; Cf. especially Vol. XXXVII (1945), Dec. LXXXIV, Heard, p. 667, n. 3. *Alibi passim.*

[34] Vol. XXXIII (1941), Dec. XLII, Janasik, p. 518, n. 6, *et alibi passim.*

[35] Vol. XXXIV (1942), Dec. LX, Heard, p. 678, n. 16.

[36] Vol. XXXIV (1942), Dec. LXI, Teodori, p. 682, n. 4, *et alibi passim.*

[37] Vol. XXXV (1943), Dec. V, Jullien, p. 34, n. 5.

[38] Vol. XXXV (1943), Dec. LXXXIV, Quattrocolo, pp. 923-924, n. 4, *et alibi passim.*

[39] Vol. XXXVI (1944), Dec. LII, Jullien, p. 599, n. 2; *ibidem,* p. 600, n. 4, *et alibi passim.*

[40] Vol. XXXVI (1944), Dec. LIII, Wynen, pp. 607-608, n. 2.

ut exceptionem videatur pati nullam; atque ad eas, nulla ratione habita circumstantiarum, casum propositum exigunt.[41]

The Rota is a conservative, judicial body, dedicated to truth and justice. On the one hand, it commends a lower court for rejecting a *libellus* four times as being void of canonical foundation,[42] and lectures courts for excessive indulgence in re-admitting cases.[43] On the other hand, it castigates needless delay, especially in processing the cases of the poor. This latter criticism merits quotation:

> Quomodo . . . per novennium circiter miserrima anima non invenit sacerdotem qui de eius casu inquireret? Revocantes quo studii apparatu causae divitum pertractentur, cum admiratione et dolore indignatio quoque exoritur quoties inferiori diligentia et amore querelae pauperum suscipiuntur. "Episcopi non sunt principes, parochi non sunt officiales civiles. Omnes pastores sunt, quibus cura gravissimis sub aeternitatis sanctionibus incumbit percurrendi desertum ut ovem errantem ad gregem reducant. Qua a lege nec Iudices, neque officii cuiuslibet Administri subducti sunt: si sacerdotes et pastores manent. Patrocinium causarum pauperum munus et gloria Ecclesiae per saecula est." [44]

In the meantime, through doctrinal elaboration and clarification, points that were once disputed in the matter of force and fear seem to have been settled. The *In Iure* section of the *Decisiones* becomes briefer and takes the turn of a more specialized discussion of one or the other particular points suggested by the *Species Facti*.[45] It remains to study this development of the jurisprudence of the Rota for the period in question, 1940-1946.

[41] Vol. XXXVIII (1946), Dec. XVI, Jullien, p. 170, n. 2.

[42] Vol. XXXVI (1944), Dec. I, Canestri, pp. 2-3 and p. 17, n. 25.

[43] Vol. XXXVIII (1946), Dec. L, Canestri, pp. 489-491.

[44] Vol. XXXVI (1944), Dec. IV, Canestri, p. 38, n. 2.

[45] Vol. XXXIII (1941), Dec. LXXXVIII, Janasik, p. 949, n. 2; Vol. XXXVI (1944), Dec. XXII, Teodori, p. 251, n. 2; Vol. XXXVII (1945), Dec. XII, Pecorari, p. 94, n. 2; Vol. XXXVII (1945), Dec. XLIX, Teodori, p. 445, n. 2; Vol. XXXVIII (1946), Dec. XLV, Brennan, p. 441, n. 2.

Section II

Terms: Scope of Canon

The Decisions of the period in question, for the most part, presume the concepts and distinctions with regard to *vis* and *metus*. No notable contribution to doctrinal clarification is made on these points.[46] The correlative nature of *vis* to *metus* is pointed out in one Decision and the standard definitions of both are given:

> Vis et metus sunt termini connexi. Vis enim tamquam causa efficiens existit in eo, qui per impulsum externum incutit metum; et definitur: Maioris rei impetus (exterior), qui repelli non potest; metus vero est effectus in eo qui vim patitur et dicitur: Mentis trepidatio, instantis vel futuri periculi vel damni causa.[47]

In another case, without using the terminology, a distinction is drawn between *vis physica seu absoluta* on the one hand and *vis moralis seu conditionalis seu metus* on the other:

> Si modo per vim mulier nupserit viro, matrimonium est nullum ex sui natura; vis enim tollit voluntarium. Quoad matrimonium initum sub metu, certum est nullum esse coniugium ex iure naturae si metus adeo mentem illius cui incussus fuit, turbaverit, ut amiserit usum rationis. Quod si metus incussus non ademerit contrahenti usum rationis, matrimonium est pariter nullum . . . dummodo . . . habeantur conditiones . . . Can. 1087, § 1.[48]

Though in several cases, the Rota explicitly includes *vis physica* as falling within the scope of Canon 1087,[49] in actual

[46] For the historical evolution of the concepts and distinctions with regard to *vis* and *metus*, Cf. Chatham, pp. 27-30; 51-52; 59-60; 66-67; 104-107.

[47] Vol. XXXVI (1944), Dec. LXVII, Pecorari, p. 732, n. 4. Cf. also Vol. XXXVII (1945), Dec. XLIX, Teodori, p. 445, n. 3.

[48] Vol. XXXIV (1942), Dec. LXI, Teodori, p. 681, n. 2.

[49] Vol. XXXIII (1941), Dec. XXXII, Teodori, p. 345, n. 2; Vol. XXXIII (1941), Dec. LXXII, Teodori, p. 837, n. 2; Vol. XXXVI (1944), Dec. LXIII, Pecorari, p. 699, n. 2.

fact the cases adjudicated were all cases of *vis moralis seu metus,* in which freedom was diminished by fear but not taken away: "*Libertatem diminuit, sed non tollit, ita ut metum patiens nunc velit quod secus noluisset.*" [50]

The distinctions of *metus* on the basis of gravity are discussed in Section VII below.

Section III

Multiplication of Capita: Metus vs. *Simulatio*

The validity of a marriage can be simultaneously attacked on several counts or *capita.* Strangely enough, the combination of *metus* and *raptus* occurs very seldom in the Rota Decisions.[51] Frequently, however, both *metus* and *simulatio,* either total or partial, are mentioned in the same case. This has elicited pointed comment and some clarification from the Rota. In general the idea is this: in a true *metus* case, *consent is given* to the marriage though the consent is vitiated. In a true *simulatio* case *no real consent* is given to the marriage. The two *capita* are therefore mutually exclusive:

> Illud tamen animadvertendum est ea esse duo invocata nullitatis capita, quae una simul consistere nequeunt. In metu enim esto vitiatus consensus exsistit, dum in simulatione deest omnino.[52]

Therefore, though a marriage may be *accused* simultaneously of being invalid on the basis of *metus* and *simulatio,* still it cannot be *declared* invalid on both grounds at once.[53] More accurately, a marriage may not be accused of invalidity *cumu-*

[50] Vol. XXXII (1940), Dec. LI, Heard, p. 557, n. 2.

[51] Vol. XXXVIII (1946), Dec. XLVI, Teodori, p. 451 sq.

[52] Vol. XXXIV (1942), Dec. XXI, Grazioli, p. 209, n. 4. Cf. also: Vol. XXXII (1940), Dec. LXIX, Heard, p. 711, n. 2; Vol. XXXIII (1941), Dec. XLIX, Wynen, p. 535, n. 2; Vol. XXXVII (1945), Dec. XXXVIII, Wynen, p. 345, n. 3; Vol. XXXVIII (1946), Dec. XII, Wynen, p. 130, n. 2.

[53] Vol. XXXIII (1941), Dec. XLIX, Wynen, p. 535, n. 2.

latively on the grounds of *metus* and *simulatio,* but both *capita* may be brought in *per modum subalternatum.*[54]

Thus, though most of the Decisions take the position that *consensus coactus est consensus verus etsi invalidus,* while *consensus simulatus est consensus nullus,* still one Decision makes a distinction and says that though total simulation is *consensus nullus,* partial simulation, however, is merely a *restrictio consensus vere dati.*[55] Accordingly, this Decision would permit a declaration of nullity on the simultaneous grounds of *metus* and *simulatio partialis.*

By way of final comment on this point, the Rota notes that *metus* produces coerced consent directly while it produces simulated consent only *indirectly.*[56] When *metus* causes simulated consent: "*metus per se est solummodo causa contrahendi dum causa simulandi est alia,* v.g. *aversio. . . . Quare logice loquendo metus in tali casu non est nisi causa remota et indirecta . . . simulationis. . . .*" [57]

In concrete cases, however, the question can arise whether *metus* has produced a *consensus coactus* or a *consensus simulatus* in a victim. If in such a case all the requirements of Canon 1087 are verified, the marriage can be declared invalid on the basis of fear: "*sed haec non est conciliatio capitum; est potius dimissio alterius quod est provisum in primo.*" [58]

Section IV

Source of Invalidity: Natural or Positive Law

An ancient problem is whether force and fear invalidate marriage in virtue of the natural law, or only in virtue of the positive law of the Church.[59] As the Rota says: "*Nondum*

[54] Vol. XXXIII (1941), Dec. XXXVI, Jullien, p. 408, n. 2; Vol. XXXIII (1941), Dec. XLII, Janasik, p. 519, n. 7.

[55] Vol. XXXIV (1942), Dec. XLVII, Wynen, p. 506, n. 12.

[56] Vol. XXXV (1943), Dec. XLVII, Heard, p. 469, n. 2.

[57] Vol. XXXVI (1944), Dec. VI, Wynen, pp. 57-58, n. 2.

[58] Vol. XXXVIII (1946), Dec. XV, Canestri, p. 163, n. 5.

[59] For the historical development of the discussion, Cf. Chatham, pp. 25-26; 43-50; 54-58; 60-62; 95-98; 157-159.

tamen finita est disputatio inter Doctores. . . ." [60] All would admit, of course, that in cases of *vis physica* and in cases of such grave fear that the victim loses the use of reason, invalidity derives from the natural law, because consent is of the essence and nature of marriage.[61] The dispute, therefore, should be strictly limited to cases of *vis moralis,* cases of *metus* in which true consent is given to marriage, but a consent caused by a fear which meets the qualifications listed in Canon 1087. If authors would limit their discussion to this particular category of cases, more definite clarification of the problems involved could be reached. Today we are experiencing a retreat from positivism in the field of secular law. Greater respect is being demonstrated for the fixed and universal principles of a law which is above the human legislator or the fancy of human society. Canonists can help and encourage this wholesome trend by deepening and clarifying their knowledge of the natural law, by stating as clearly as possible the scope and limitations of the natural law as applied to life. Nothing is gained by stretching the application of the natural law, as such, to cover every legal and social problem. We need to distinguish between the natural law as a *guide* to morality and right order on the one hand, and as a *source of invalidity* in juridical matters on the other. A whole gamut of distinctions, as clearly defined as possible, need to be made. The courts of the Church, faced with concrete cases of litigation, are in an excellent position to make a notable contribution in this important field of the philosophy of law.

In the present problem, when both parties to a marriage are baptized, and subject, therefore, to the law of the Church, it makes no practical difference whether *vis moralis* or *metus* invalidates in virtue of the natural law or in virtue of the positive law of the Church. The problem has a practical bearing upon the decision of a court only in the instance of the unbaptized who are not subject to the Canons. Nevertheless,

[60] Vol. XXXII (1940), Dec. LXVIII, Wynen, p. 747, n. 5.

[61] Cf. Vol. XXXIV (1942), Dec. LXI, Teodori, p. 681, n. 2.

force and fear cases present a unique opportunity to the courts of the Church to study and clarify basic theory which, in turn, will have many practical applications.

A few Decisions of the Rota attempt to reconcile the natural law and positive law theories by holding that fear, as described in Canon 1087, invalidates marriage in virtue of a positive law that is rooted and grounded in the natural law.[62] This is undoubtedly true, but since almost every legal enactment is related in some way to the natural law, the position stated here does not differ essentially from the positive law theory.

Only one Decision in the period 1940-1946 comes out clearly in favor of the natural law theory, but even in this case the *Turnus* fails to state explicitly that it is the natural law which *invalidates* a marriage contracted as a result of moral coercion:

> Cum obiectum matrimonialis contractus, traditio nempe proprii corporis sub alterius potestate, valde grave sit, naturae ius ipsum requirit ut a quacumque coactione, tum morali tum physica, nuptiae immunes reddantur.[63]

Strangely enough, the strongest case for the natural law theory is made in a Decision which ends up by taking refuge in the positive law:

> Quandoquidem quoties matrimonium ex metu gravi ab extrinseco et iniuste incusso contrahatur, metus patiens eo praecise tendit, ut malum grave sibi imminens devitet, quare matrimonium celebrat et vult, non primario, sed unice uti medium ad malum vitandum. Plane proinde intelligitur non deesse inter iuris consultos qui ex ipso naturae iure metus impedimentum derivent. Quidquid sit, Ecclesia hoc impedimentum induxit. . . .[64]

[62] Vol. XXXIV (1942), Dec. XLIII, Wynen, p. 452, n. 2; Vol. XXXV (1943), Dec. XX, Wynen, p. 177, n. 2; Vol. XXXVI (1944), Dec. XXXV, Wynen, p. 312, n. 2.

[63] Vol. XXXIV (1942), Dec. IV, Quattrocolo, p. 43, n. 2.

[64] Vol. XXXIV (1942), Dec. LXVIII, Grazioli, p. 730, n. 3.

All other Decisions of the period 1940-1946 which discuss the problem embrace the positive law theory and ascribe the invalidating effects of coercion to the law of the Church. In so doing, many of these Decisions ascribe, as the *ratio canonica* of the Church: 1. The desire to obviate the evil effects which are the result of coercion in marriage; 2. The protection of the individual person from the injury and injustice of being coerced into marriage; 3. The preservation of the full freedom of the individual person in assuming the grave responsibilities of married life.[65]

Section V

Methods of Proof of Invalidating Fear

The Rota recognizes two methods of proving invalidating fear: the indirect method and the direct method. The indirect method establishes the *aversion* of at least one of the parties to the marriage in question, and from this there flows the presumption that this aversion was overcome only by grave fear. The direct method establishes the facts which expressly demonstrate the coercive measures used.

> *Indirecte* metus *probatur* per praesumptionem quae oritur ex aversione patientis proposito matrimonio; *directe* vero per *facta* expresse coactionem demonstrantia.[66]

[65] Vol. XXXII (1940), Dec. XXVI, Heard, p. 279, n. 2; *Vol. cit.*, Dec. LI, Heard, p. 557, n. 2; *Vol. cit.*, Dec. LXIV, Heard, p. 711, n. 2. Vol. XXXIII (1941), Dec. XXXI, Pecorari, p. 337, n. 5; *Vol. cit.*, Dec. XXXII, Teodori, p. 345, n. 2; *Vol. cit.*, Dec. XXXVI, Jullien, p. 408, n. 2; *Vol. cit.*, Dec. LIII, Caiazzo, p. 582, n. 2; *Vol. cit.*, Dec. XC, Heard, p. 964, n. 2. Vol. XXXIV (1942), Dec. III, Grazioli, p. 34, n. 4; *Vol. cit.*, Dec. VIII, Heard, p. 68, n. 2; *Vol. cit.*, Dec. XVI, Grazioli, p. 155, n. 2. Vol. XXXV (1943), Dec. XXIII, Quattrocolo, p. 222, n. 2; *Vol. cit.*, Dec. XLVII, Heard, p. 468, n. 2; *Vol. cit.*, Dec. LXXXIV, Quattrocolo, p. 923, n. 3; Vol. XXXVII (1945), Dec. LXXIX, Heard, p. 666, n. 2; Vol. XXXVIII (1946), Dec. V, Fidecicchi, p. 61, n. 4; *Vol. cit.*, Dec. XXXVIII, Caiazzo, pp. 369-370, n. 3; *Vol. cit.*, Dec. LXIII, Caiazzo, p. 633, n. 2.

[66] Vol. XXXIV (1942), Dec. V, Janasik, p. 48, n. 2. Cf. also: Vol. XXXII (1940), Dec. XL, Wynen, p. 448, n. 2; *Vol. cit.*, Dec. L, Teodori, p. 548, n. 5; Vol. XXXV (1943), Dec. XIII, Canestri, p. 100, n. 2; *Vol. cit.*, Dec. LIV,

In the concrete, different approaches are necessary, and the procedure in establishing all the essential elements in Canon 1087 varies with the circumstances of each case. We may note here, as will be studied later in this paper: 1. Any pressure brought to bear upon a party, which pressure results in marriage, is *unjust* if it exceeds the bounds of moderation; hence if gravity is proved, injustice is automatically proved also; 2. The only instance in which a grave harm can be justly threatened is the case in which a man has violated a woman and recourse is made or threatened through legal channels; 3. If it is clear in a case that *a person* is the agent of fear, it may not be necessary to dwell upon the extrinsic origin of the fear; 4. Frequently, therefore, the only two points in Canon 1087 that need to be explicitly developed are the *gravity* of the fear and the fact that marriage was the *only escape.*

Several outlines of proof are frequently used in *metus* cases:

Schema I: 1. Who inflicted the fear; 2. For what reason; 3. What harm or evil was threatened; 4. What is the character and temperament of the victim of fear? [67]

Schema II: 1. What were the causes for the alleged aversion; 2. What signs of aversion were given before marriage; 3. At the marriage; 4. After the marriage? [68]

Schema III: 1. What are the indications of grave aversion; 2. What was the character and temperament of the agent and of the victim of the alleged fear; 3. Why was the fear inflicted; 4. What means were used to cause fear? [69]

Canestri, p. 551, n. 2; *Vol. cit.,* Dec. LV, Pecorari, p. 574, n. 9; *Vol. cit.,* Dec. LXVIII, Caiazzo, p. 732, n. 8; *Vol. cit.,* Dec. LXIX, Jullien, p. 736, n. 2; *Vol. cit.,* Dec. LXIX, Jullien, p. 736, n. 2; *Vol. cit.,* Dec. LXVIII, Caiazzo, p. 923, n. 3; *Vol. cit.,* Dec. LXXXV, Canestri, p. 931, n. 2; Vol. XXXVI (1944), Dec. VIII, Quattrocolo, p. 88, n. 2; *Vol. cit.,* Dec. XXXIII, Wynen, p. 361, n. 4; *Vol. cit.,* Dec. XXXVI, Canestri, p. 405, n. 3; *Vol. cit.,* Dec. XLVI, Pecorari, p. 528, n. 2; Vol. XXXVII (1945), Dec. VI, Teodori, p. 40, n. 2; Vol. XXXVIII (1946), Dec. V, Fidecicchi, p. 61, n. 5.

[67] Vol. XXXVI (1944), Dec. XXV, Canestri, pp. 282-284, nn. 15-18; *Vol. cit.,* Dec. XXXVI, Canestri, pp. 419-422, nn. 9-11, *et alibi passim.*

[68] Vol. XXXVI (1944), Dec. XXXVI, Canestri, pp. 406-419, nn. 5-8, *et alibi passim.*

[69] Vol. XXXVII (1945), Dec. VI, Teodori, p. 40, n. 2, *et alibi passim.*

Section VI

The Indirect Proof of Invalidating Fear

A. *General Observations Concerning Aversion*

In its treatment of aversion as a proof of fear, the Rota frequently quotes Decretal Law:

> In cap. 14, *De Spons. et Matrimonio,* tit. I, lib. IV, Decretalium Gregorii IX, legimus: "Matrimonium solo consensu contrahitur; et ubi de ipso quaeritur, plena debet securitate ille gaudere, cuius est animus indagandus, ne per timorem dicat sibi placere quod odit; et sequatur exitus, qui de invitis nuptiis solet provenire".[70]

The *aversio* or *odium* which, when established, is indicative of fear having been used, need not bear against the *person* of the spouse or proposed spouse, it is sufficient that it bear against *marriage* with this person.[71] At the same time, it is pointed out repeatedly that a mere *absence of love* is not the same as positive *aversion.*[72]

Aversion is referred to as the *cardo* and *fundamentum* of proof in *metus* cases.[73] While such a statement may be a bit strong, certainly *aversion* is of such significance that cognizance of it should be taken in all briefs and sentences in cases of force and fear.

When grave aversion is definitely established in a case, the existence of *fear* is not thereby *directly* proved, but the judge is given reasonable grounds for the *praesumptio hominis* that fear has been inflicted and the aversion thus overcome.[74]

[70] Vol. XXXV (1943), Dec. LV, Pecorari, p. 568, n. 3., *et alibi passim.*

[71] Vol. XXXV (1943), Dec. VI, Quattrocolo, pp. 40-41, n. 6; *Vol. cit.,* Dec. XLIX, Heard, p. 496, n. 5; *Vol. cit.,* Dec. XXXII, Quattrocolo, p. 305, n. 2; Vol. XXXVI (1944), Dec. XIX, Pecorari, p. 182, n. 2.

[72] Vol. XXXVI (1944), Dec. XLVII, Heard, p. 543, n. 9; *Vol. cit.,* Dec. LI, Pecorari, p. 585, n. 4; *Vol. cit.,* Dec. LXIII, Pecorari, p. 699, n. 4. *Et alibi passim.*

[73] Vol. XXXV (1943), Dec. LXVIII, Caiazzo, p. 732, n. 8.

[74] Vol. XXXVI (1944), Dec. LI, Pecorari, p. 585, n. 4.

Aversion serves as a basis for this presumption when it is demonstrated to have existed *before* the marriage, *during* the marriage and *after* the marriage.[75]

It may happen, at times, that one party in a case professes to have known nothing of fear suffered by the other spouse. One Decision makes an interesting observation on this point:

> Generaliter insuper qui metum patiuntur, necessarie animi sui sensus, praesertim coram sponso et extraneis, simulat . . . si ita non esset, inexplicabile evaderet quomodo tot dentur matrimonia coacte inita. . . .[76]

B. *The Probative Value of Aversion*

The statement is frequently made in the Decisions that fear cannot be proved unless aversion has been proved. For example:

> . . . certum tamen est, quod metus ipse non habetur, quoties praedicta aversio vel contrarietas locum non habuerit; hoc enim in casu consensus matrimonialis spontaneus praesumi debet, non ex metu aut ex coactione praestitus.[77]

The reason for this general statement is: ". . . *volenti non fit iniuria, quae est nullitatis fundamentum, metus causa.*" [78] However, it is difficult for a general statement in this matter to go unchallenged, and, in at least one Decision the Rota holds that a cogent argument for invalidating fear can be constructed even when there is *no* aversion:

> Deesse igitur potest argumentum ex magna aversione desumptum; sed nihilominus aliunde probari potest matrimonium nonnisi ex gravi et iniusto metu contractum esse.[79]

[75] Vol. XXXVI (1944), Dec. LI, Pecorari, p. 585, n. 4; Vol. XXXVIII (1946), Dec. XIX, Pecorari, p. 182, n. 2. *Et alibi passim.*

[76] Vol. XXXVIII (1946), Dec. XLV, Fidecicchi, p. 415, n. 2.

[77] Vol. XXXIII (1941), Dec. XXVII, Pecorari, p. 273, n. 2; Cf. also: Vol. XXXVI (1944), Dec. XXVI, Pecorari, pp. 293-294, nn. 8-9; *Vol. cit.*, Dec. XLI, Caiazzo, p. 464, n. 2; Vol. XXXVII (1945), Dec. XIX, Teodori, p. 182, n. 2; Vol. XXXVIII (1946), Dec. XLV, Brennan, p. 442, n. 3.

[78] Vol. XXXV (1943), Dec. LXIX, Jullien, p. 736, n. 2.

[79] Vol. XXXVI (1944), Dec. XXXIII, Wynen, p. 362, n. 4.

This may be true, force and fear may be demonstrable even where no aversion exists; however, it seems safe to say that invalidating fear could never be proved if the parties were not only not adverse to each other, but were positively in love with each other. This fine point demonstrates clearly that the judge in each case must weigh all the circumstances and reach his own conclusion, without depending too strongly upon pre-fabricated rules of evaluation.

In general, the rule is sound: prove aversion, and the basis is established for a presumption that the marriage was forced:

> Ex hac autem circumstantia [nempe, probata aversione] eo ipso oritur praesumptio coacti coniugii seu privationis libertatis in contrahendo matrimonio requisitae ut . . . valide ineatur.[80]

Some of the Decisions do not speak merely of aversion as being the basis for a presumption of fear; they speak rather of a *grave* aversion, a *constant* aversion or even an *invincible* aversion.[81] The point is that the aversion must be of such a nature as to establish a reasonable presumption that it could be overcome only by a *grave* fear. It is here that the judge, in the light of all the circumstances of the case, must make a prudent judgment. The reasons for the judgment reached should be spelled out in the sentence.

One Decision makes a statement which seems to attribute too much to the indirect proof:

[80] Vol. XXXII (1940), Dec. VI, Wynen, p. 65, n. 5. Cf. also: *Vol. cit.*, Dec. LV, Heard, p. 579, n. 4; *Vol. cit.*, Dec. LXXV, Janasik, p. 821, n. 4; Vol. XXXIII (1941), Dec. XI, Janasik, p. 90, n. 2; *Vol. cit.*, Dec. LIX, Wynen, p. 632, n. 2; Vol. XXXV (1943), Dec. VIII, Canestri, p. 52, n. 2; *Vol. cit.*, Dec. XXVII, Teodori, p. 253, n. 5; *Vol. cit.*, Dec. LV, Pecorari, p. 576, n. 10; *Vol. cit.*, Dec. LVIII, Heard, p. 622, n. 13; Vol. XXXVI (1944), Dec. VIII, Quattrocolo, p. 88, n. 2; *Vol. cit.*, Dec. XVII, Pecorari, pp. 183-184, n. 7; *Vol. cit.*, Dec. XXVI, Pecorari, p. 290, n. 5; Vol. XXXVII (1945), Dec. XLV, Fidecicchi, p. 415, n. 2; Vol. XXXVIII (1946), Dec. XLVIII, Pecorari, p. 467, n. 2.

[81] Vol. XXXII (1940), Dec. XIV, Teodori, p. 136, n. 5; *Vol. cit.*, Dec. LXIV, Heard, p. 711, n. 2; Vol. XXXIII (1941), Dec. LIX, Wynen, p. 632, n. 2; *Vol. cit.*, Dec. LII, Pecorari, p. 568, n. 2; Vol. XXXV (1943), Dec. XCIII, Quattrocolo, p. 1026, n. 10; Vol. XXXVI (1944), Dec. XLI, Caiazzo, p. 464, n. 2; *Vol. cit.*, Dec. LXIII, Pecorari, p. 699, n. 4.

> Ceterum constat ex sola indirecta probatione metum evinci posse, nam Can. 1828 Iudicem sinit praesumptiones . . . coniicere. . . .[82]

Frequently the Rota checks unrestrained enthusiasm for the indirect proof with explicit qualifications and warnings:

> . . . aversio quando probatur, non constituit indicium metus nisi ambiguum, quia non semper vincitur coactione, et matrimonium propter alias rationes libere iniri potest.[83]

The ambiguity of the argument from aversion, as mentioned in the Decisions cited, arises from the fact that *consent makes marriage,* and a person *can* consent to marry a person whom he does not love:

> Saepius etiam ex magna aversione propositi contractus consensum invite datum desumes, sed non item ex mero defectu amoris. Nam frequentius matrimonia contrahuntur ob honestas causas sine amore a principibus . . . egenis . . . viduis, et . . . valida. . . .[84]

Considerations such as these are placed in their proper perspective by a Decision which recognizes the importance of the proof from aversion, but holds that it is *not sufficient,* of itself, to justify a decision of invalidity:

> Probata aversione gravi, gravi coactione eam superatam esse praesumitur, sed praesumptio haec, hominis quidem, non sufficit ad declarandam matrimonii nullitatem, nisi argumentis certis confirmetur . . . cum aliud sit non libenter contrahere, aliud coacte, nupturiens enim potest matrimonium sibi invisum inire etsi aegre, sponte tamen . . . repugnantiam evincit motus causis a coactione plane diversis . . . vult morem gerere sponte. . . . Proinde aversio, ab intrinseco superata, sine iniuria cadit.[85]

[82] Vol. XXXIII (1941), Dec. II, Grazioli, pp. 10-11, n. 3.

[83] Vol. XXXII (1940), Dec. I, Grazioli, p. 7, n. 9. Cf. also *Vol. cit.,* Dec. II, Quattrocolo, p. 16, n. 7; *Vol. cit.,* Dec. IV, Heard, p. 45, n. 10; *Vol. cit.,* Dec. LXI, Pecorari, p. 669, n. 5; *Vol. cit.,* Dec. LXX, Canestri, pp. 769-770, n. 3.

[84] Vol. XXXII (1940), Dec. LI, Heard, p. 558, n. 2.

[85] Vol. XXXV (1943), Dec. LXIX, Jullien, p. 736, n. 2.

C. *Aversion to Marriage: "Morem gerere parentibus" vs. "matrimonium inire ex metu"*

The preceding considerations lead naturally to a problem which affects both the indirect and the direct proof of fear. The case is this: a girl does not love a certain boy, yet her parents put pressure on her to marry him and she does so. If the girl conforms her will to the will of her parents out of love for the *parents,* respect for them, or a desire to help them, her action would be to *"morem gerere parentibus",* and the marriage, on this account, would not be invalid. On the other hand, if she marries the boy to avoid a grave harm or harassment to *herself,* the marriage would be contracted *ex metu* and would be invalid. A number of penetrating observations are made by the Rota on this rather subtle point. One example will be quoted as an illustration, and others will simply be cited in the footnote. All bear consideration.

> Nec invitus animus probatur ex sola contristatione quae necessario adest si quis matrimonium sibi invisum ob reverentiam seu amorem quem habet parentum acceptat; imo potest quis etiam aversionem matrimonii superare ob speciales conditiones, ut v. g. egestatem parentum quas alias evitare nequit. Ad probandam nullitatem matrimonii necessarium est demonstrare filium voluntati parentum non obtemperare, sed potius subiisse, et quidem ob rationes sibi extrinsecas.[86]

This position is balanced by a warning in another Decision:

> Sed sicut non constat de invito animo ex eo quod aliquis [*sic*] habeatur in animo repugnantia . . . ita etiam non constat de more gesto ex eo solo quod quis, resistentiam vanam esse agnoscens, in sua sorte acquiescens, ad solatium animi prae

[86] Vol. XXXVI (1944), Dec. VI, Wynen, p. 60, n. 7. Cf. also: Vol. XXXIII (1941), Dec. V, Pecorari, p. 39, n. 2; Vol. XXXIV (1942), Dec. XLV, Caiazzo, p. 478, n. 2; Vol. XXXV (1943), Dec. LIV, Canestri, p. 551, n. 2; *Vol. cit.,* Dec. XCIII, Quattrocolo, p. 1021, n. 2; Vol. XXXVI (1944), Dec. VI, Wynen, p. 60, n. 7; Vol. XXXVI (1944), Dec. V, Pecorari, p. 32, n. 2.—especially clear; *Vol. cit.,* Dec. XXI, Jullien, p. 218, n. 2; *Vol. cit.,* Dec. XXXV, Wynen, pp. 322-323, n. 16; *Vol. cit.,* Dec. XXXVIII, Wynen, p. 354, n. 19.

> oculis ponat bona quae forsan ex propositis nuptiis venire possint, ut parentum gaudium etc. . . . Prudens Iudex ex totius causae adiunctis videre debet, an verum motivum consensus praestiti fuerit mentis ex metu oppressio, vel desiderium parentibus obtemperandi.[87]

Section VII

Direct Proof: Ob Vim Vel Metum Gravem

The canonical institute of *vis vel metus* as invalidating marriage has been the object of a long process of doctrinal evolution which has added and clarified qualifications one by one. Historically the first qualification required of *vis vel metus* in order that it invalidate marriage was that it must be *grave*.[88] By the date of the publication of the Code of Canon Law all the necessary distinctions with regard to degrees of gravity had been made and modern canonical science has added nothing to the work done in earlier periods. Drawing upon the Decisions of the Rota for the period 1940-1946, this section will sketch briefly the salient features of canonical jurisprudence on the gravity of fear as invalidating marriage.

In the first place, the Rota notes that *gravity* is the prime requisite in fear if it is to invalidate marriage:

> Ex hisce qualitatibus, quibus metus praeditus sit oportet ut irritet matrimonium, gravitas est illa de qua ante omnia constare debet.[89]

In order to evaluate this gravity in the adjudication of concrete cases, the Rota calls upon the rule laid down by the Holy Office in 1883:

> Ad gravitatem metus recte aestimandam, sufficit prae oculis habere notam Instructionem S. O. diei 20 iunii 1883 datam. Iuxta hanc Instructionem, praecipue considerari debet, pro

[87] Vol. XXXVII (1945), Dec. LXI, Heard, p. 548, n. 2.—*Constat de nullitate,* reversing Vol. XXXIV (1942), Dec. XLII, Janasik, pp. 441-451.

[88] For the historical development of this qualification, Cf. Chatham, pp. 6; 20-21; 27-30; 51-52; 59-60; 66-75; 104-109.

[89] Vol. XXXVII (1945), Dec. XXXV, Wynen, p. 313, n. 3.

singulis casibus: quaenam et qualis sit persona, quae metum incutit, malum minitando; quaenam et qualis persona, cui metum agens minitatur; quale sit hoc malum, quod alter minitatur, alter vero pertimescit.[90]

Using a norm such as this, a graduated analysis of *vis vel metus* in terms of the degree of gravity can be constructed. Such a composite picture will first be presented, and then each degree of gravity will be illustrated or commented upon from the Decisions:

1. Vis physica seu absoluta, vel metus tollens usum rationis;
2. Vis moralis seu conditionalis vel metus communis;
3. Metus communis absolute gravis;
4. Metus communis relative gravis;
5. Metus reverentialis mixtus cum metu communi;
6. Metus reverentialis qualificatus;
7. Metus levis;
8. Metus simpliciter reverentialis;
9. "Metus" illius qui mere morem gerit parentibus.

1. *Vis physica seu absoluta, vel metus tollens usum rationis* results in a mere mechanical response on the part of the victim. Marriage is invalidated by the natural law. With the modern canonical form of marriage, it may be doubted whether an instance of this kind is possible.[91]

2. The terms *vis moralis seu conditionalis* on the one hand, and *metus communis* or simply *metus* on the other, are used synonymously. In this degree of fear, true consent is given to the marriage. If, however, all the qualities mentioned in Canon 1087 are verified, the consent given is not capable of effecting the marriage bond.[92] In the concrete, this *metus communis* will either be *absolute gravis* or *relative gravis* as described in the categories which follow immediately.

[90] Vol. XXXVIII (1946), Dec. LXVIII, Pecorari, p. 467, n. 2.

[91] Vol. XXXIV (1942), Dec. LXI, Teodori, p. 681, n. 2; Vol. XXXV (1943), Dec. LXIII, Pecorari, p. 699, n. 2.

[92] Vol. XXXIV (1942), Dec. LXI, Teodori, p. 681, n. 2; Vol. XXXVI (1944), Dec. LXIII, Pecorari, p. 699, n. 2; Vol. XXXVII (1945), Dec. XIX, Pecorari, pp. 181-182, n. 2.

3. *Metus communis absolute gravis* is fear which is grave or serious, independently of any consideration of the personal traits or weaknesses of the victim. This is the fear which, according to the ancient terminology, is *cadens in virum constantem.*[93] The judge has to decide, in the light of all the circumstances of a case, whether this degree of fear is verified:

> Quinam autem metus cadat in constantem virum, Iudicis disquisitione definiendum est in singulis casibus, cum statui a iure non possint in particulari omnes casus.[94]

Besides the evident cases of fear of death and grave bodily harm, the Rota mentions the fear of the loss of one's reputation as being *absolute gravis.*[95] Fear of grave harm to one's relatives can also be *absolute gravis* if this harm to others redounds to the injury of the person who is forced to use marriage in order to effect safety.[96]

4. *Metus communis relative gravis* is fear born of a threatened harm or evil which, though not grave for everyone, is, nevertheless, grave for *this* person who is threatened. The verification of such fear in a particular case calls for a carefully balanced consideration by the judge of such factors as age, sex, education, temperament, etc.[97] The victim must be convinced that the harm or evil truly threatens.[98] However, this must be a reasonable judgment on the part of the victim,

[93] Vol. XXXVII (1945), Dec. XIX, Pecorari, pp. 181-182, n. 2.

[94] Vol. XXXVII (1945), Dec. XXXIII, Jullien, p. 298, n. 2. It should be noted that the phrase "*metus cadens in virum constantem*" is sometimes also applied to "*metus relative gravis.*"

[95] Vol. XXXVII (1945), Dec. XXXIII, Jullien, p. 298, n. 2; Vol. XXXVIII (1946), Dec. LIII, Fidecicchi, p. 525, n. 3.

[96] Vol. XXXIV, (1942), Dec. V, Janasik, p. 48, n. 2.

[97] Vol. XXXV (1943), Dec. XVII, Caiazzo, p. 145, n. 2; Vol. XXXVI (1944), Dec. LXIII, Pecorari, p. 699, n. 2; Vol. XXXVII (1945), Dec. XIX, Pecorari, pp. 181-182, n. 2.

[98] Vol. XXXV (1943), Dec. XVII, Caiazzo, p. 145, n. 2; Vol. XXXVII (1945), Dec. XIX, Pecorari, pp. 181-182, n. 2.

and a marriage would not be invalidated if the threats were clearly the crude expression of passing anger, or if the victim could easily have absented himself until the anger subsided.[99] Furthermore, while consideration is to be given to the personal traits and weaknesses of a victim, and certain allowances can even be made for mistakes in the judgment of the victim concerning the gravity or the reality of the threatened harm or evil, still, the victim's estimate of the gravity of a threatened harm or evil may not be entirely subjective, if fear is to invalidate the marriage:

> Recte quidem notat De Smet (*De sponsalibus et matrimoniis*, n. 536, in nota 5): "Ut in foro externo admittatur nullitas matrimonii ex capite vis et metus, ratio quidem habetur dispositionis subiectivae personae metum patientis, sed requiritur tamen aliqua gravitas obiectiva in malo comminato; et sic non sufficeret quod nupturiens reipsa fuerit graviter motus ex timore mali omnino levis in se" . . .[100]

5. As will be seen in the two grades of fear which are next described, *metus reverentialis* needs to be further qualified in order to invalidate marriage. *Here* we note that the harm or evil, done or threatened by parents or superiors to one subject to them, can be of such gravity as to move the resulting fear out of the category of *metus reverentialis qualificatus* into the category of *metus communis*. For all practical purposes such fear could be treated under either category; and in the *Tabula Rerum* at the back of each volume of Rota Decisions, such cases are listed both under *metus communis* and under *metus reverentialis*. Twenty-three cases are given this double listing by the Rota during the period 1940-1946.[101]

6. *Metus reverentialis qualificatus* is the type of invalidat-

[99] Vol. XXXVI (1944), Dec. XXXIII, Wynen, p. 360, n. 2.

[100] Vol. XXXVII (1945), Dec. LXXIV, Heard, p. 666, n. 2.

[101] Reference to this type of fear is seen, e.g. in Vol. XXXII (1940), Dec. LXXV, Janasik, p. 829, n. 12; Vol. XXXIII (1941), Dec. IV, Teodori, p. 31, n. 2.

ing fear most frequently seen in court cases. The essence of reverential fear is found in two things: 1. a bond of dependence between a child and parent, between a subject and a superior; 2. indignation on the part of the parent or superior:

> Verum haec adminicula non agunt per se, sed supponunt subiectionem et indignationem personae sub cuius potestate quis est constitutus. Si haec duo elementa deficiant, metus reverentialis ne concipitur quidem. . . .[102]

Reverential fear is of its very nature *levis*. In order to invalidate marriage it must be *qualified* by the presence of notable *adminicula:*

> Metus reverentialis cuius obiectum specificum est offensio parentum in se levis est. Si autem ex adiunctis rationabiliter praevidetur offensio gravis fore et diuturna, tunc gravis dicendus est metus, et quidem iniustus.[103]

These *adminicula* can, in themselves, also be slight; for as we have seen above, *" haec adminicula non agunt per se "*. These *adminicula* constitute grave fear, fear which invalidates marriage, only because of the simultaneous presence of the bond of subjection and reverence which is present in the parent-child relationship. By exerting more than moderate, reasonable pressure on the child, the parent offends against justice and creates the effect of grave fear in the child. It is impossible to give an exhaustive list of these *adminicula* or qualifications, but typical examples will be found in every Rota case of reverential fear, for instance: *praeceptum paternum, paternum imperium, minae, verberationes,*[104] *minae etsi non graves, verbera, importunae et instantissimae preces,*[105] *privatio hereditatis* (though this would probably be sufficient to consti-

[102] Vol. XXXVIII (1946), Dec. XXXV, Teodori, p. 353, n. 4. Cf. also *Vol. cit.*, Dec. XXIX, Caiazzo, p. 292, n. 2.

[103] Vol. XXXIV (1942), Dec. LX, Heard, p. 672, n. 2.

[104] Vol. XXXIII (1941), Dec. V, Pecorari, pp. 38-39, n. 2.

[105] Vol. XXXV (1943), Dec. XX, Wynen, p. 178, n. 4.

tute *metus gravis communis*),[106] *percussiones, saevitiae, indignatio gravis et diuturna,*[107] *imperium durum paternum etiam absque minis et absque repetitis precibus,*[108] *gravissima et insupportabilia incommoda* [109] and similar harassments. Reverential fear is compatible with true paternal love; [110] even gifts when combined with inopportune entreaties and urgings can contribute to an invalidating fear;[111] and, though it may be difficult to prove in fact, in theory at least, reverential fear can qualify the consent of an adult, independent male sufficiently to render the consent invalid.[112]

7. Slight fear, on the other hand, does not invalidate marriage:

> Equidem metus levis . . . matrimonium irritare nequit, cum is qui huiusmodi metu motus contraxerit, sibi ipsi imputare debeat quod consenserit, neque ab extrinseco cogi dicendus est.[113]

8. Neither does *metus simpliciter reverentialis* render matrimonial consent invalid. In this connection, parents are permitted to use moderate scolding and precepts; promises by the parents would not be sufficient to induce invalidating fear; neither would one or two slaps.[114]

9. Finally, the reluctant attitude of the child who marries in order to aid or please the parents, *qui morem gerit parenti-*

[106] Vol. XXXIII (1941), Dec. LIV, Roberti, p. 591, n. 6.

[107] Vol. XXXIV (1942), Dec. VIII, Heard, pp. 68-69, n. 2.

[108] Vol. XXXVII (1945), Dec. XLV, Fidecicchi, p. 414, n. 2.

[109] Vol. XXXV (1943), Dec. XXVI, Quattrocolo, p. 246, n. 2.

[110] Vol. XXXVI (1944), Dec. VIII, Quattrocolo, p. 90, n. 7.

[111] Vol. XXXV (1943), Dec. XXVII, Teodori, p. 253, n. 4.

[112] Vol. XXXVII (1945), Dec. LIX, Wynen, p. 528, n. 4; Vol. XXXIV (1942), Dec. X, Wynen, p. 93, n. 7.

[113] Vol. XXXIII (1941), Dec. IV, Heard, p. 39, n. 2.

[114] Vol. XXXIV (1942), Dec. IV, Quattrocolo, p. 43, n. 2; Vol. XXXVII (1945), Dec. XX, Wynen, p. 203, n. 12.

bus, is no manifestation of the presence of an invalidating fear.[115]

Section VIII

Direct Proof: Ab Extrinseco

Grave fear invalidates marriage only if it is *ab extrinseco.* The *ab extrinseco* qualification was not explicitly required by the Decretals.[116] However, it was implied in the Decretal text and, before the Code, the courts and authors introduced this qualification as an essential requisite.[117] The point has not been the object of special controversy.

The Rota describes the qualifications in this fashion:

> Ab extrinseco dicitur metus, quando procedit, non ab interni animi aestimatione, in eo qui metum patitur; sed a causa externa et libera. . . .[118]

All of the qualifications of invalidating fear, as required by Canon 1087, are closely related to each other, and in many cases are identified with each other. In the study of the *gravity* of fear, it has been seen how *metus levis* is necessarily *ab intrinseco.* In the examination of reverential fear, it was observed that *gravity* and *injustice* are identified with each other in excessive parental pressure. Here we may note a certain identity between the *ab extrinseco* and the *iniuste incussus:* if an agent threatens a harm or evil which is legal and just, the resulting fear derives rather from the law, from the circumstances of the case, *ab intrinseco,* and not from the free, external agent as such:

[115] Vol. XXXV (1943), Dec. XCIII, Quattrocolo, p. 1021, n. 2; Vol. XXXVI (1944), Dec. XXIX, Heard, p. 321, n. 2; *Vol. cit.,* Dec. XLV, Wynen, p. 518, n. 2; Vol. XXXVII (1945), Dec. XXI, Jullien, p. 218, n. 2; Vol. XXXVIII (1946), Dec. LIV, Pecorari, p. 533, n. 2.

[116] Cf. Chatham, p. 21, § 2.

[117] Cf. Chatham, pp. 68-71.

[118] Vol. XXXII (1940), Dec. LXXXI, Pecorari, p. 783, n. 2. Cf. also: *Vol. cit.,* Dec. XXVI, Heard, p. 279, n. 2; Vol. XXXIII (1941), Dec. LXXXVI, Teodori, p. 935, n. 2; Vol. XXXV (1943), Dec. XVII, Caiazzo, p. 145, n. 2.

> Debet praeterea incuti a causa libera, id est ab homine et absque iure, videlicet iniuste. . . .[119]

Thus, fear deriving from the law is not only just, but also, in a way, is *ab intrinseco.*

Thus, too, if a parent or a friend explains objectively to a hesitant bride or groom the inconveniences and potential scandal that would be inherent in a situation in which marriage would be refused, the fear conceived in the mind of the bride or groom, under the circumstances, would not be *ab extrinseco.*[120]

Similarly, if a son developed a case of fear in his own mind over what his father *might do* should the son not marry, even though the father has given no positive indication of future, prolonged indignation, such fear would be *ab intrinseco* and would not invalidate matrimonial consent.[121]

Again, if a boy has rendered a girl pregnant under circumstances which indicate that he has an obligation to marry the girl, and the boy's mother points out this obligation to him, telling him that unless he fulfill his obligation, she wishes to have nothing more to do with him, the fear thereby caused in the boy could easily be *ab intrinseco.*[122]

In another case, John and a certain woman have lived together as husband and wife without benefit of marriage. The woman threatens John that, unless he marry her, she will tell all, and commit suicide. John's fear, born of the suicide threat, would be *ab intrinseco.* In this particular case the Rota held that the threat to reveal the secret sinful cohabitation would also be *ab intrinseco.*[123] However, this does not seem to be the position generally taken by the Rota, and, at

[119] Vol. XXXIII (1941), Dec. XXXII, Teodori, pp. 345-346, n. 2.

[120] Vol. XXXIII (1941), Dec. XXXIV, Caiazzo, p. 391, n. 4.

[121] Vol. XXXVII (1945), Dec. LXVIII, Heard, p. 621, n. 2.

[122] Vol. XXXVI (1944), Dec. VI, Wynen, pp. 59-60, nn. 6-7.

[123] Vol. XXXIV (1942), Dec. IX, Caiazzo, p. 77, n. 4.

least, one can safely say that the Rota generally holds that the threat to reveal a person's secret sins is *iniuste incussus*.[124]

A final case which illustrates the *ab extrinseco* qualification is this: Hedwidge does not wish to marry the boy of her mother's choice. The mother builds up the case of her own illness in the mind of Hedwidge, and tells her that unless she marry the boy, she will be the cause of the mother's death. Hedwidge is goaded by her mother to fear not only harm to the mother but also adverse public opinion against herself. In this case we see a good example of how fear which would have been *ab intrinseco,* becomes metus *ab extrinseco:*

> Hoc modo infirmitas matris, quae per se quid necessarium et malum extraneum a patiente violentiam moralem exstitisset, facta est causa libera. . . .[125]

A problem long disputed was whether or not the *causa libera* of fear had to have the specific intention of effecting marriage or not. This is the question of *metus consultus* vs. *metus inconsultus,* of *metus directe incussus* vs. *metus indirecte incussus.* The problem could logically be discussed at this point, but it seems to be more correct from the historical point of view to treat it under the final qualification of fear: *" a quo ut quis se liberet, eligere cogatur matrimonium."* Therefore, this topic is deferred to that particular section. It may be noted here, however, how this consideration demonstrates again the close connection among the various essential qualifications of fear as described in Canon 1087.

Section IX

Direct Proof: Et Iniuste Incussum

A. *General Observations on the Fear " Iniuste Incussus "*

The long and complex evolution of canonical jurisprudence on the question of the injustice of coercion in marriage is

[124] E.g., Vol. XXXVII (1945), Dec. XXXIII, Jullien, p. 298, n. 2; Vol. XXXVIII (1946), Dec. LIII, Fidecicchi, p. 525, n. 3.

[125] Vol. XXXIV (1942), Dec. V, Janasik, p. 51, n. 7.

briefly summarized in Canon 1087: "*Invalidum quoque est matrimonium initum ob vim vel metum . . . iniuste incussum. . . .*" [126] The phrase means very little without doctrinal elaboration. Most of the points that have appeared in the history of the problem have turned up in the 247 cases of force and fear adjudicated by the Rota in the period 1940-1946. From these cases, therefore, an almost complete synthesis of current canonical jurisprudence on the fear *iniuste incussus* can be constructed.

God made man free. To infringe upon human freedom without cause is an injustice. The desire to curb injustice has prompted the Church to establish the impediment of *metus*: "*. . . fundamentum metus est praecise iniuria seu iniustitia in coactione illata.*" [127] Further elaboration of this point is found in the *dictum*: "*'qui iure suo recte utitur, non infert iniuriam; nec iniuriam patitur, qui iure omnino caret'* (Wernz-Vidal, *Ius matrim.*, n. 587, nota 24)." [128]

B. *The Distinction between "Metus Iniustus quoad Substantiam" and "Metus Iniustus quoad Modum"; a disputed point is settled.*

Before the Code, the authors had introduced the distinction between *metus iniustus quoad substantiam* and *metus iniustus quoad modum*.[129] Most of the authors of the pre-code period held that only *metus iniustus quoad substantiam* invalidated marriage, and, therefore, for all practical purposes, the Courts of the Church were obliged to take this position.[130] The Code of Canon Law, as we now know, settled the question: *metus iniustus quoad modum tantum* also invalidates marriage. Yet,

[126] Cf. Chatham, pp. 8; 13-15; 22-25; 30-42; 63-64; 76-94.

[127] Vol. XXXVI (1944), Dec. LV, Teodori, p. 626, n. 2. Cf. also: Vol. XXXIII (1941), Dec. III, Heard, p. 24, n. 2; *Vol. cit.*, Dec. X, Heard, p. 84, n. 2; Vol. XXXVI (1944), Dec. XXI, Wynen, p. 240, n. 2.

[128] Vol. XXXII (1940), Dec. LXI, Pecorari, pp. 668-669, n. 2.

[129] Chatham, p. 79-81.

[130] Chatham, p. 81.

it took the authors and tribunals some time to reach complete agreement on this point.[131]

Several of the Rota Decisions of the period 1940-1946 define and explain the distinction.

METUS INIUSTUS QUOAD SUBSTANTIAM is present: 1. When the fear is caused by threats of a punishment *too grave* for the crime committed, such as threats of death to a seducer; [132] 2. When the victim does not deserve the evil threatened.[133]

METUS INIUSTUS QUOAD MODUM is present: 1. When threats are made by a *private person* or one who has no right to execute them; [134] 2. When the order or procedure required by the law is not followed; [135] 3. When the agent of the threats has recourse to deceit or to calumnies or to illegal procedures; [136] 4. When the threats are made in an improper or unjust manner.[137]

One Decision of the period, which is vague, seems to require *metus iniustus quoad substantiam* in order to render a marriage invalid.[138] Only one Decision between 1940 and 1946 clearly states that the fear must be unjust *quoad substantiam,*[139] but this opinion was pointedly over-ruled by the *Tur-*

[131] Chatham, pp. 112-115.

[132] Vol. XXXIII (1941), Dec. LXVII, Janasik, p. 518, n. 4.

[133] Vol. XXXIII (1941), Dec. LXXVII, Teodori, p. 838, n. 2; *Vol. cit.,* Dec. LXXVI, Teodori, p. 935, n. 2; Vol. XXXIV (1942), Dec. XXXII, Wynen, p. 326, n. 3 called *quoad modum* here; *Vol. cit.,* Dec. LXVII, Heard, p. 723, n. 2; Vol. XXXV (1943), Dec. XXI, Canestri, p. 196, n. 2; *Vol. cit.,* Dec. XLV, Quattrocolo, p. 450, n. 25.

[134] Vol. XXXIII (1941), Dec. LXVII, Janasik, p. 518, n. 4; *Vol. cit.,* Dec. LXXVII, Teodori, p. 838, n. 2; *Vol. cit.,* Dec. LXXXVI, Teodori, p. 935, n. 2.

[135] Vol. XXXIII (1941), Dec. LXXVII, Teodori, p. 838, n. 2; *Vol. cit.,* Dec. LXXXVI, Teodori, p. 935, n. 2; Vol. XXXIV (1942), Dec. LXVII, Heard, p. 723, n. 2.

[136] Vol. XXXIV (1942), Dec. XXXII, Wynen, p. 326, n. 3.

[137] Vol. XXXV (1943), Dec. XXI, Canestri, p. 196, n. 2; Vol. XXXV (1943), Dec. XLV, Quattrocolo, p. 450, n. 25.

[138] Vol. XXXIII (1941), Dec. XXXII, Teodori, pp. 345-346, n. 2.

[139] Vol. XXXII (1940), Dec. XXXIV, Canestri, p. 373, n. 7 and p. 377, n. 12.

nus of appeal which gave a *Constat de nullitate* sentence which was *facta executiva*.[140] All other Decisions hold unequivocally that *metus iniustus quoad modum tantum* invalidates marriage, and the dispute may safely be considered as settled in this manner.[141]

C. *Examples of Fear Which Is Just*

Seldom will two cases of force and fear be found which are alike in all respects. In evaluating the justice or injustice of threats and the fear which they cause, the judge must take into consideration all the circumstances peculiar to each case. Nevertheless it is interesting and helpful to examine examples of threats and fear which the Rota has considered just: [142]

1. Parents and superiors can justly use advice and persuasion to induce their children or subjects to marry, but marriage cannot be *imposed* upon them, and ultimately the *liberty* of the child or subject must be preserved. Therefore, the parents could *not* simply *command* the child to marry.[143]

2. If a girl, through her own fault, has become pregnant, her father is justified in expressing indignation for an extended period of time.[144]

3. A mother who has learned of an immoral relationship being carried on by her daughter can justly use moderate coer-

140 Vol. XXXIV (1942), Dec. XXXII, Wynen, pp. 324-336, esp. n. 6.

141 Vol. XXXII (1940), Dec. XIV, Teodori, p. 135, n. 3; *Vol. cit.*, Dec. XXVI, Heard, p. 279, n. 2; Vol. XXXIII (1941), Dec. LIV, Roberti, p. 588, n. 2; Vol. XXXIV (1942), Dec. XVI, Grazioli, p. 155, n. 2; Vol. XXXV (1943), Dec. XLI, Canestri, p. 404, n. 22; *Vol. cit.*, Dec. XLVII, Heard, p. 468, n. 2; Vol. XXXVIII (1946), Dec. II, Heard, p. 34, n. 2; *Vol. cit.*, Dec. V, Fidecicchi, p. 61, n. 4; *Vol. cit.*, Dec. XIV, Teodori, p. 152, n. 3; *Vol. cit.*, Dec. XXXVIII, Fidecicchi, p. 387, n. 3.

142 Cf. Chatham, pp. 81-84.

143 Vol. XXXIV (1942), Dec. III, Grazioli, p. 34, n. 4; *Vol. cit.*, Dec. LII, Pecorari, p. 568, n. 2; *Vol. cit.*, Dec. LIX, Grazioli, p. 675, n. 2; *Vol. cit.*, Dec. LX, Heard, p. 672, n. 2; Vol. XXXV (1943), Dec. LVIII, Heard, p. 614, n. 2.

144 Vol. XXXII (1940), Dec. XXVI, Heard, p. 284, n. 9.

cion to cause the daughter to consult her own honor and that of her family.[145]

4. If a girl has carried on a sinful relationship with a boy and thereby become pregnant, her parents can justly advise her: "You can no longer remain in this house in your condition."[146]

5. Parents commit no injustice if they seriously upbraid a son and require him to marry his fiancée under circumstances in which the son ardently loves the girl, lives with her in concubinage, but is simply indifferent to marriage.[147]

6. No injustice is committed when a just harm or evil is threatened against a man who is actually discovered in the act of crime (i.e. abuse of a woman), for example: "I will bring charges against you, unless you marry the girl."[148] HOWEVER, THIS POSITION IS QUALIFIED IN ANOTHER DECISION WHICH APPROVES CERTAIN DISTINCTIONS MADE BY DE SMET AND LEHMKUHL:

7. DE SMET: A. One can justly threaten to bring charges against the violator of a woman unless he *either* marries *or* endows the woman; B. One can justly threaten to bring charges against a man who has violated a *virgin* under *promise* of marriage, unless he *actually marries* her. LEHMKUHL: A. A father can justly threaten to bring charges against the violator of his daughter for the purpose of *repairing injustice;* if the man offers to marry the girl to stop the charges, the marriage is valid; B. If the father mentioned immediately above specifically required marriage to correct the injustice, the threat to bring charges could be unjust because the man is

[145] Vol. XXXII (1940), Dec. XXXIII, Wynen, p. 361, n. 10.

[146] Vol. XXXIII (1941), Dec. XXVII, Pecorari, p. 282, n. 13; Vol. XXXVI (1944), Dec. XXI, Wynen, p. 240, n. 2.

[147] Vol. XXXIII (1941), Dec. XLIX, Wynen, p. 537, n. 5.

[148] Vol. XXXIII (1941), Dec. LIII, Caiazzo, p. 583, n. 2; Vol. XXXIV (1942), Dec. XXXIII, Teodori, p. 338, n. 2; Vol. XXXVIII (1946), Dec. XLV, Brennan, p. 442, n. 4.

entitled to the *alternative* of *either* marrying *or* endowing the girl.[149]

8. If the father or the brothers of a girl *reasonably think* that a certain man is the father of her child, they can justly threaten to bring the matter to court, namely, for adjudication.[150]

9. A judge can justly require the violator of a woman to marry her.[151] This principle, however, must be used with caution because a judge, in the normal course of events, must apply the law *as he finds it*. If the law leaves the matter to the discretion of the judge, then the judge can justly use his discretion.

10. A mother does not act unjustly if she refuses to continue to give a son huge sums of money which she had previously given him.[152]

11. A disappointed fiancé is not immediately to be accused of injustice if he loses his temper especially if, after the first outburst of anger, he resorts to persuasion.[153]

12. Several decisions point out that fear which is caused to effect a mere circumstance, for example, the time or the place of a marriage, would not render the marriage invalid, and this is reasonable. However, one *might question* the position which states that fear brought about to cause an *indeterminate* marriage is not invalidating; in other words, the victim is forced *to marry,* but the choice of a partner is left to the victim. This seems to be a gratuitous statement.[154]

D. *Examples of Fear Which is Unjust* [155]

[149] Vol. XXXIV (1942), Dec. X, Wynen, pp. 85-86, n. 2.

[150] Vol. XXXVIII (1946), Dec. XIX, Heard, p. 199, n. 5.

[151] Vol. XXXIV (1942), Dec. XVI, Grazioli, p. 155, n. 2.

[152] Vol. XXXIII (1941), Dec. XXXVIII, Heard, p. 431, n. 22.

[153] Vol. XXXVI (1944), Dec. XXI, Wynen, p. 240, n. 2.

[154] Vol. XXXVI (1944), Dec. XXVI, Pecorari, p. 290, n. 5.

[155] Cf. Chatham, pp. 85-86.

1. The basic injustice in matrimonial coercion is to force a person to marry *against his or her will.*[156] This sets up an identification between the "*iniuste incussus*" and "*directe incussus*", which is discussed in the final section of this paper.

2. It is an injustice for a private person to threaten to inflict a punishment that can justly be carried out only by public authority.[157]

3. It is unjust for parents or others in authority to abuse a fear which is *ab intrinseco,* such as fear for health, fear from conscience, and thus turn it into fear *ab extrinseco.*[158]

4. Abuse of parental authority is unjust. This admits of many variations.[159]

5. It is unjust to threaten to reveal a secret crime.[160]

6. A relative who has no obligation to give financial assistance to a girl or her family, nevertheless, acts unjustly if she threatens to withdraw this help with the specific intention of forcing the girl to marry.[161]

7. A pregnant girl has, at most, an obligation in charity (not in justice) to repair the honor of her family by entering marriage, and, therefore it would be unjust for her father to *impose* marriage upon her.[162]

[156] Vol. XXXII (1940), Dec. VI, Wynen, p. 62, n. 2.

[157] Vol. XXXII (1940), Dec. XXXII, Jullien, p. 344, n. 2; Vol. XXXVIII (1946), Dec. XXXVIII, Fidecicchi, p. 387, n. 3.

[158] Vol. XXXIII (1941), Dec. X, Heard, p. 84, n. 2. and p. 88, n. 9.

[159] Vol. XXXIII (1941), Dec. LIX, Wynen, p. 632, n. 2; Vol. XXXIV (1942), Dec. III, Grazioli, p. 34, n. 4; *Vol. cit.,* Dec. VIII, Heard, pp. 68-69, n. 2; Vol. XXXIV (1942), Dec. LIX, Grazioli, p. 675, n. 2; *Vol. cit.,* Dec. LX, Heard, p. 672, n. 2; Vol. XXXVI (1944), Dec. XXV, Canestri, p. 272, n. 2; *Vol. cit.,* Dec. LXI, Pecorari, p. 680, n. 3; *Vol. cit.,* Dec. XX, Wynen, p. 203, n. 12; Vol. XXXVII (1945), Dec. XXIII, Teodori, p. 231, n. 2.

[160] Vol. XXXII (1940), Dec. I, Grazioli, p. 3, n. 3; Vol. XXXVII (1945), Dec. XXXIII, Jullien, p. 298, n. 2.

[161] Vol. XXXIII (1941), Dec. XXXI, Pecorari, p. 340, n. 11; Vol. XXXVI (1944), Dec. XXI, Wynen, p. 240, n. 2.

[162] Vol. XXXII (1940), Dec. XXVI, Heard, p. 284, n. 9; Vol. XXXV (1943), Dec. LVIII, Heard, p. 614, n. 2; Vol. XXXVIII (1946), Dec. XIV, Teodori, p. 152, n. 3.

8. In bringing charges against a person, it is unjust to exaggerate the crime this person has committed.[163]

9. It is unjust to threaten to bring charges against a man who has seduced or sinned with a *corrupt* woman, or a woman who has *consented*.[164]

10. Lehmkuhl holds that a father would act unjustly by requiring marriage of the seducer of his daughter, under threats to bring criminal charges and without giving the seducer the alternative of endowing the girl.[165]

11. A court acts unjustly by using unqualified experts.[166]

12. A judge acts unjustly when he fixes a penalty more severe than that provided in the law.[167]

E. *The Pre-Code Obligation to Marry "ex Contractu"*

Before the Code, canonical jurisprudence, which had the practical effect of law, recognized a two-fold source of obligation to marry, namely *ex contractu* and *ex delicto*.[168] In instances in which this obligation had been assumed, coercion could justly be used to effect the fulfillment of the obligation. This undoubtedly led to abuses, and, as a result, Canon 1017, § 3, of the Code of Canon Law eliminated completely the actionable obligation to marry as arising from promise, contract, espousals. In commenting upon this, the Rota wisely remarks:

> Et quod Ecclesia facere non vult, certe parentibus facere non licet. . . .[169]

While the Code thus removes all juridical obligation to marry from the canonical contract of espousals, it goes one step fur-

[163] Vol. XXXIV (1942), Dec. XXXII, Wynen, p. 327, n. 4.

[164] Vol. XXXIV (1942), Dec. X, Wynen, pp. 85-86, n. 2.

[165] Vol. XXXIV (1942), Dec. X, Wynen, pp. 85-86, n. 2.

[166] Vol. XXXIV (1942), Dec. XXXII, Wynen, p. 327, n. 4.

[167] Vol. XXXIII (1941), Dec. XLVII, Janasik, p. 518, n. 3.

[168] Cf. Chatham, pp. 22-25; 31-38; 53; 77-79; 126-127.

[169] Vol. XXXII (1940), Dec. LV, Heard, p. 605, n. 5.

ther in the case of non-canonical, informal promises to marry and renders them incapable of effecting any obligation even in the internal forum (Can. 1017, § 1).

F. *The Obligation to Marry "ex Delicto"*

Several of the examples of *just* and *unjust* fear listed in "C" and "D" of this Section clearly find application only in cases in which pressure is brought to bear upon a seducer. What obligation does a seducer have to the woman whom he has abused? As far as force and fear cases are concerned, this is the basic issue. The point is: *proper* pressure brought to bear upon a person to constrain him to fulfill *an obligation* is not unjust.[170]

1. The fundamental obligation of a seducer is expressed in the alternative: *aut duc aut dota:*

> Praxis Ecclesiae eiusque iurisprudentiae, in decisionibus S. R. Rotae praesertim manifestata, optionem concessit aut ducendi aut dotandi virginem defloratam.[171]

2. However, this alternative derives from canonical jurisprudence and would not necessarily bind a secular judge, so long as the judge adhered to the provisions of the law of his particular jurisdiction.[172]

3. Seduction and similar crimes are *delicta mixti fori* (Can. 1933, § 3), and therefore a seduced girl or her parents could justly have recourse to the secular courts:

> Nec denique metus . . . ob recursum . . . ad publicum . . . magistratum . . . dici potest iniustus; cuilibet namque civi integrum est . . .[173]

[170] Cf. Chatham, pp. 86-95; 123-125; 127-145.

[171] Vol. XXXIII (1941), Dec. XLVII, Janasik, p. 517, n. 3; Vol. XXXVIII (1946), Dec. XLV, Brennan, p. 442, n. 4.

[172] Vol. XXXII (1940), Dec. XXXIV, Canestri, pp. 371-372, n. 3. This decision was reversed by a subsequent *Turnus:* Vol. XXXIV (1942), Dec. XXXII, Wynen, pp. 324-336—but the reversal does not touch this point of law.

[173] Vol. XXXIV (1942), Dec. XV, Pecorari, pp. 149-150, nn. 5-6.

4. Since a boy who has seduced a girl has a fundamental obligation either to marry or to endow the girl, the boy's parents could justly use *moderate coercion* to cause him to contract marriage, but they may not insist if he is absolutely unwilling.[174]

5. Once a case has been brought into the secular courts, the justice or the injustice of the action of the judge must be determined by the provisions of applicable secular law.[175]

6. While a secular judge has the latitude allowed by secular law and, within this context, he can rather insist upon marriage if the seducer is financially unable to endow the girl, yet he cannot simply *force* a seducer to marry against his will.[176]

7. There is a canonical opinion to the effect that a man who seduces a girl under promise to marry her, has an obligation to contract the marriage without benefit of the alternative to endow her:

> In contractu namque innominato "do ut facias" cum unus dederit, alter . . . non liberatur. . . .[177]

This principle would allow greater authority to parents to insist upon marriage in order to fulfill the obligation assumed. It may be, however, that this principle, once generally accepted, now needs to be re-examined in the light of Can. 1017, which has nullified the obligation to marry which once attached to promises and contracts.

Section X

Direct Proof: A Quo ut Quis se Liberet, Eligere Cogatur Matrimonium

Dominicus Soto (1494-1560) in his analysis of fear as invalidating marriage had introduced a distinction between fear

[174] Vol. XXXVII (1945), Dec. LXXXI, Wynen, p. 733, n. 2.

[175] Vol. XXXIII (1941), Dec. II, Grazioli, p. 10, n. 2; *Vol. cit.*, Dec. XLVII, Janasik, pp. 517-518, n. 3; Vol. XXXV (1943), Dec. XLVII, Heard, p. 472, n. 8; Vol. XXXVIII (1946), Dec. II, Heard, p. 34, n. 2.

[176] Vol. XXXVIII (1946), Dec. II, Heard, p. 36, n. 4.

[177] Vol. XXXIV (1942), Dec. XV, Pecorari, p. 150, n. 6.—See also, p. 149, n. 5.

inflicted for the *precise purpose of causing marriage,* and fear inflicted *for some other purpose.*[178] This came to be known as the distinction between *metus directe incussus* and *metus indirecte incussus* or, as some preferred, the distinction between *metus consultus* and *metus inconsultus.* Though a strong minority opinion developed from the time of De Lugo (1583-1660), the fact remains that, before the Code, the maority opinion, which had the practical effects of law, held that only *metus directe incussus* or *metus consultus* invalidated marriage.[179]

Canon 1087 clearly adopted the minority opinion: *metus indirecte incussus* can certainly invalidate marriage so long as it places the victim in a position from which marriage offers the only means of escape: *a quo ut quis se liberet, eligere cogatur matrimonium.* Cardinal Gasparri explained that this was the intention of the Commission in formulating Canon 1087.[180] It took the Rota some time to accept the change introduced by Canon 1087. But this was eventually done, and between the years 1925-1939 thirteen Rota Decisions spelled out the common opinion that *metus directe incussus* is not required for fear to invalidate marriage.[181]

It remains now to examine the jurisprudence of the Rota on this point for the period 1940-1946. Out of 247 force and fear cases adjudicated during the period, *five times,* in sentences affecting marriages contracted *after the Code,* the Rota slips back into the Pre-Code position and requires, or seems to require *metus directe incussus.*[182] In cases too numerous to cite,

[178] Cf. Chatham, pp. 64-65.

[179] Cf. Chatham, pp. 71-75.

[180] Cf. Chatham, pp. 150-151.

[181] Cf. Chatham, pp. 153-156.

[182] Vol. XXXII (1940), Dec. XIV, Teodori, p. 135, n. 3; *Vol. cit.,* Dec. XXVIII, Janasik, p. 299, n. 2; Vol. XXXIII (1941), Dec. II, p. 10, n. 2; *Vol. cit.,* Dec. XXXII, Teodori, p. 345, n. 2; Vol. XXXV (1943), Dec. XXVI, Quattrocolo, p. 246, n. 2.

the *a quo ut quis se liberet* is simply quoted or paraphrased in such a way as to leave no doubt: *metus indirecte incussus* can invalidate marriage. From time to time, however, the Rota does explicitly restate the old argument and takes occasion to point out the change introduced by Canon 1087 under which *metus indirecte incussus* can invalidate marriage.[183]

This dispute can now be considered as settled, but this by no means solves all problems in connection with the point. Canon 1087 speaks of marriage being invalid only when entered *ob vim vel metum,* in such a way that the victim *eligere COGATUR matrimonium.* There must be a causal connection between fear and the resulting marriage. The marriage must be *ex metu* and not merely *cum metu.* It is perfectly clear, of course, that when the agent of fear *demands marriage,* and the victim accedes to the demand, the resulting marriage is *ex metu.* If the intention of the agent is not thus clearly expressed, and the fear is patently *metus indirecte incussus,* then special attention must be given to other circumstances of the case, and chiefly to the *aversion* of the victim to the marriage which he nevertheless enters.[184]

Conclusion

While it is clear, in considering the indirect argument that love can turn to aversion and hate can give way to love and

[183] Vol. XXXII (1940), Dec. XXXII, Jullien, p. 344, n. 2; *Vol. cit.,* Dec. LX, Canestri, p. 669, n. 2; *Vol. cit.,* Dec. LXXII, Canestri, p. 791, n. 2; Vol. XXXIII (1941), Dec. XLVII, Janasik, p. 518, n. 5; *Vol. cit.,* Dec. LXXI, Wynen, p. 776, n. 2; Vol. XXXIV (1942), Dec. XXXVI, Canestri, p. 361, n. 2; Vol. XXXV (1943), Dec. XII, Grazioli, pp. 82-83, n. 2; *Vol. cit.,* Dec. XLVII, Heard, p. 468, n. 2; Vol. XXXVI (1944), Dec. XII, Caiazzo, p. 120, n. 2; *Vol. cit.,* Dec. XXXIII, Wynen, pp. 360-361, n. 2; *Vol. cit.,* Dec. LXVII, Pecorari, p. 732, n. 4.

[184] Vol. XXXII (1940), Dec. XXXII, Jullien, p. 344, n. 2; *Vol. cit.,* Dec. LXIV, Heard, p. 712, nn. 2-3 and p. 715, n. 8; Vol. XXXIII (1941), Dec. XXVII, Pecorari, p. 274, n. 2; Vol. XXXV (1943), Dec. XLVII, Heard, p. 468, n. 2; Vol. XXXVI (1944), Dec. XII, Caiazzo, p. 120, n. 2; *Vol. cit.,* Dec. LXVI, Pecorari, p. 732, n. 4; Vol. XXXVII (1945), Dec. XIX, Pecorari, p. 182, n. 2; *Vol. cit.,* Dec. LXIX, Pecorari, p. 629, n. 2; Vol. XXXVIII (1946), Dec. XLI, Heard, p. 410, n. 5.

thus alter a case, the fact always remains that fear, to invalidate marriage, must be present when the marriage takes place.[185]

I thank Fathers John Izral and Alfred Camp who did much of my pastoral work while this paper was being prepared and Mrs. Edward DeMiller, Jr., who typed the manuscript. Finally, before the assembled Canon Law Society of America, I would ask the privilege of saluting the priests of the Sacred Roman Rota:

> Omnes vere pastores sunt qui percurrunt desertum ut ovem errantem ad gregem reducant!

[185] Vol. XXXVIII (1946), Dec. XXVIII, Fidecicchi, p. 284, n. 3, *et alibi passim*.

Cases and Studies

THE EXTRAORDINARY FORM OF MARRIAGE (CAN. 1098, 2°) AND DIRIMENT ECCLESIASTICAL IMPEDIMENTS

This is a review of the book by Gonzalvus a Raamsdonk, O.F.M. Cap., *De cessatione impedimenti disparitatis cultus in extraordinariis territorii circumstantiis,* Roma, 1955.

1. This work, a doctorate thesis, deals with the diriment matrimonial impediment of *disparitas cultus* in marriages which were celebrated in the extraordinary form according to Can. 1098. The opinion of the author is that in many cases the impediment of *disp. cultus* would cease to exist and the marriage would be valid without having obtained a previous dispensation. The arguments are concerned only with the impediment of *disp. cultus.* But on page 102 he applies the same principles to other ecclesiastical diriment impediments. It is true that all decisions of the Holy Office quoted are dealing with cases in mission districts. In mission countries, of course, the impediment of *disp. cultus* will be the most common diriment ecclesiastical impediment. The three answers of the Holy Office given after the last war for the Celebes are only for the impediment of *disp. cultus,* because the questions were concerned only with this impediment (R. pp. 40, 49, 52). But the decisions from the last century were not restricted to *disp. cultus* cases. The two decisions for China of 1949 speak of all ecclesiastical diriment impediments from which the Church is wont to dispense. Canonists are quoted who in extraordinary circumstances admit the cessation of diriment ecclesiastical impediments as opposed to the demands of natural law. Other canonists admit this cessation only for the *impedimentum disparitatis cultus* if a catholic can marry only a pagan partner. But in primitive communities of mission countries the choice of a marriage partner is often very restricted by native customary laws. Cases happen that a man cannot get married because he has no sister to give in exchange, or he has no relatives who could help him with the bride price.

2. In small and isolated communities marriages with blood relations cannot be avoided. Canonists admit the cessation of the impediment of *disp. cultus* if very few catholics live in a pagan community. But in a village of 100 inhabitants it may be necessary for a man to marry a woman who is related to him in the third degree of consanguinity of the collateral line. He cannot find another partner. If the cessation of impediments is admitted, the distinction between *disp. cultus* and other impediments is not justified. It is customary law in New Guinea that a man marry the wife of his deceased brother. There are districts in New Guinea where the men outnumber the women by a very high ratio. So men have to wait very long until they can get married. But a young man has a chance to get married quickly if his brother died and leaves the widow for him. He should marry her according to native law. If he does not, he may have to wait ten years or more until he finds a marriage partner. It is the same with the *impedimentum criminis*. A catholic was married in the Church. After some years he took a second wife unlawfully. During the war his first wife died. There was no priest available to give dispensation from the *impedimentum criminis*. But it is not possible for this man to find another marriage partner, and he has some children from this second wife. These examples show that the above mentioned distinction of impediments is not justified. This is the weak point of Raamsdonk's work right from the start.

3. The second chapter deals with the possibility of using *epikeia*. But there are no ecclesiastical decisions mentioned which would justify the use of *epikeia*.

4. The third chapter brings forward the opinions of canonists. Many authors are quoted for the cessation of impediments, but all these authors do not quote an ecclesiastical decision to prove their point. Wernz is against the cessation of impediments, and he alone quotes decisions of the Holy Office for his opinion. Jone is quoted as in favour of cessation according to his Moral Theology. But it is interesting to note that Jone in his great work, *Das Gesetzbuch der lateinischen Kirche*, does not treat this question at all. There are other canonists who do not touch this question. So R. has certainly gone too far when he speaks of *sententia communis* (p. 25). There are other canonists who hold the opposite opinion, whom R. does not mention: Triebs, *Handbuch des kanonischen Eherechtes*,

Breslau, 1925, p. 154: "The impediment does not cease through the impossibility to get a dispensation"; p. 142: "It does not matter whether it is physically or morally impossible to ask for or to get a dispensation". Moersdorf, *Archiv fuer katholisches Kirchenrecht*, 1949-1950, p. 90: "In case of a diriment impediment the marriage before two witnesses only would be invalid". Sipos, *Enchiridion Juris Canonici*, p. 568: "In casu impedimenti non potest fieri celebratio coram solis testibus, quia dispensare sacerdos tantum valet". Arregui, *Summarium Theol. Moralis*, ed. 13, n. 731: "Cessatio intrinseca generatim non admittitur, si sit lex statuens impedimentum dirimens, neque ob grave incommodum contrahentium neque ob legis ignorantiam". Schoensteiner, *Eherecht*, 1936, p. 487: "There may be cases in which for reasons of higher justice or equity the law may not be enforced. But the judgment about this does not rest with the subject of the law, but with the lawgiver. Only the lawgiver can pass judgment that in a certain case the law is not binding". Vromant admits the cessation in certain cases, but he certainly is not so sure of his opinion if he says: "Post adhibitam epikeiam in hac lege irritante impedimenti disparitatis cultus generatim admittitur, si fieri possit, petendam esse dispensationem vel sanationem, ad cautelam" (*De Matrimonio*, n. 66). The same uncertainty we find in the article published by Fr. de Reeper in *The Jurist*, vol. 14, p. 184. L. Denis, S.J., is against *cessatio impedimenti* in a case where the priest was absent for three years and a catholic married a pagan before witnesses and with *cautiones*. He considers the marriage as invalid (*Revue du Clergé Africain*, Mayidi, Congo Belge, 1947, p. 182).

5. The decisions of the Holy Office in the 19th century do not admit the cessation of impediments in extraordinary circumstances. It seems not possible to give them another meaning as R. tries to do. R. p. 40 says: "Praeterea videtur valde improbabile quod Ecclesia fideles relinquat in concubinatu, licet materiali tantum, si non sit necessarium". But the answer of the Holy Office for Japan in 1868 says: "Quoad eos, qui sunt in bona fide, Vacarius Apostolicus sileat omnino". So the Church leaves them in *concubinatu materiali*. The decision for Korea, 1878 says: "Sileat, si putati coniuges sint in bona fide" (Resp. ad 1. at the end, quoted from *Collectanea de Prop. Fide*, Romae, 1907, n. 1499). Decision of the Holy Office, June 8, 1932, to the Prefect Apostolic of Peng Yang: "The mind of

the Sacred Congregation is that, as regards the past, it is left to the prudent discretion of the Ordinaries of Corea to heal the marriages already celebrated, so as not to deprive the parties of the grace of the sacrament, or to leave them in good faith, or to declare such marriages null according to the reply to the second question" (Quoted from Doheny, *Canonical Procedure in Matrimonial Cases,* vol. II., p. 62, second printing 1948). A *sanatio in radice* of a marrigae with the impediment of *disp. cultus* requires the *cautiones* from the catholic party; Winslow, *A Commentary on the Apostolic Faculties,* p. 139: "The *cautiones* (for *sanatio in radice*) must be required from the Catholic party in the usual manner prescribed by law"; J. de Reeper, *A Missionary Companion,* 2. ed., p. 85; Vromant, *Facultates Apostolicae,* n. 74: "Si propter disparitatem cultus matrimonium, in radice sanandum, fuerit nullum, exigendae sunt *cautiones.*—Quoad partem tamen *acatholicam,* formalis promissio non requiritur, sed necessarium est et sufficit, uti declaravit S.C.S. Officii, ut 'moraliter certum sit partem acatholicam educationem universae prolis tam natae quam nasciturae catholicam educationem *non esse impedituram*' (S. C. de Prop. F. ad locorum Ordinarios, die 2 Julii 1930)". This asking of the *cautiones* may cause embarrassment or astonishment. For this reason such couples can be left in *bona fide* without *sanatio in radice.* Concerning the answer of the Holy Office for Japan, 1868, R. says: "convalidatio ad cautelam requiritur" (p. 34), but in the text of the answer nothing is said of "*ad cautelam*". The same can be said of R's. "*ad cautelam*" on page 37, explaining the answer of the Holy Office, 1878, for Corea.

6. From the two replies of the Holy Office for Celebes, p. 46 and p. 50, one is not forced to conclude that these marriages are valid. From the expression "*valida putari*" of the second answer one may conclude that the "*habenda uti valida*" of the first answer presupposes "*bona fide*" marriages. If there are no difficulties, the couples may be left in *bona fide.* But if difficulties arise, especially danger for the faith of the children, it will be necessary to declare the nullity of the marriages by a competent tribunal, or to get a dissolution of the marriage from Rome, because the marriage celebrated in the extraordinary form has still the external appearance of a valid marriage. The effect in both ways will be the same: to help the partners of such an invalid marriage which is no longer a *bona fide*

marriage. The expression "*quatenus opus sit, solvitur*" in the third reply of the Holy Office for Celebes (p. 52) seems at first sight to indicate a dissolution of a doubtfully valid marriage. But another explanation is possible: The marriage in question (catholic-mahomedan) has the external appearance of a valid marriage, but to establish its nullity a *declaratio nullitatis* by a tribunal is required. The missionary considered the marriage as invalid and Catharina contracted a new marriage. But before contracting a new marriage the *declaratio nullitatis* of the first marriage would have been necessary. Whether this has been done or not is not indicated in the petition. So the *dissolutio* "*quatenus opus sit*" is for the case that a *declaratio nullitatis* was not given in Celebes. The use of the expression "*quatenus opus sit*" for facts which were not mentioned in a petition, but which might have happened, can be shown in other examples: Holy Office, 2 February, 1955: "Included in the present concession also, *as far as it may be needed*, is the dispensation from the impediment of crime. . . ." (Bouscaren, *Canon Law Digest*, Suppl. 1954, Can. 1127). Quite the same words we find in Holy Office, 8 August, 1955 (Bouscaren, *o.c.* 1955, Can. 1127). In both cases it was possible, or even probable, that the impediment of crime was present, but in the petition nothing was mentioned about it. To make sure, dispensation *quatenus opus sit* was given. R. himself admits, p. 53: "Utrum ergo in casu impedimentum disp. cultus cessaverit necne, ex dato responso non patet". One is inclined to assume that the impediment has not ceased.

7. The two decisions of the Holy Office for China, 1949. The question put by Bishop Brellinger was: "An fideles . . . impedimentis ab Ecclesia statutis . . . teneantur . . .". So one may assume that the meaning of the answer is: *non tenentur*. That means an abrogation of the diriment ecclesiastical impediments (except two) for China in certain circumstances and *ad tempus*. Huerth, S.J., consultor of the Holy Office, says that these concessions for China cannot be extended to other countries, R. p. 62. Against this opinion of Huerth R. thinks that from the second decree for China (p. 64) it follows that these concessions can be extended to other countries and even to cases of the past. But one cannot agree with R. on this point. The text of the decree says: "Ad 1. Decretum S. Officii datum die 27 ianuarii 1949 eatenus tantummodo habere indolem interpretationis declarativae et ideo retrotrahi et ad alia ter-

ritoria applicari posse, quatenus versatur circa iuris positivi praescripta, quae, consideratis circumstantiis extraordinariis territorii, observari non possunt; quoad reliqua autem habere indolem dispositionis positivae, quae non valet retrorsum neque applicari potest ad territoria in Decreto non nominata". But this text admits another explanation: "*Juris positivi praescripta*" means the *praescripta* for the form in the Code. The prescriptions are expressed in the Code in positive terms. Can. 1094: Ea tantum matrimonia valida sunt; Can. 1095: Parochus et loci Ordinarius valide matrimonio assistunt; Can. 1096: Licentia assistendi matrimonio . . . dari expresse debet. Whereas the rulings for the impediments do not come under "*iuris positivi praescripta*", because they are expressed in negative terms. Can. 1067: matrimonium valide inire non possunt; Can. 1068: matrimonium ipso naturae iure dirimit; Can. 1069: invalide matrimonium attentat. So the concessions concerning the impediments cannot be extended to other countries or to cases of the past, because they are not "*iuris positivi praescripta*". But there can be circumstances outside China in which the obligatory form is dispensed from. This does not appear so strange, because Cappello says: "Si desit qui super forma dispensare valeat, probabile est, matrimonium ex epikeia etiam sine testibus posse celebrari in *gravissimis rerum adiunctis*. . . ." (*De Matrim.* ed. 6., n. 695). The same opinion is held by Vromant, *De Matr.*, n. 212, and Gasparri, *De Matr.*, n. 998, 999 (Quoted from J. De Reeper, *The Sacraments on the Missions*, Dublin, 1957, p. 393). So the concessions concerning the form can be extended to other countries and to cases of the past, but not the concessions for the impediments.

8. R. says p. 93: "In responso, die 27 ianuarii 1949 pro Sinis dato, respondetur ad duplex dubium; responsum ad primum dubium est declaratio de cessatione impedimentorum dirimentium in extraordinariis territorii circumstantiis; responsum ad secundum dubium est dispositio, qua cautiones aequipollentes requiruntur pro cessatione impedimenti disparitatis cultus. Haec dispositio abrogatur responso dato die 22 decembris 1949; ideoque cautiones aequipollentes non amplius requiruntur". But what is said in the first answer for China (p. 54) of the *cautiones aequipollentes* can be understood as concerning "*ad liceitatem*" only. The second decree clearly states that the *cautiones* are required only "*ad liceitatem*". We cannot suppose that the Holy Office gives a regulation in a de-

cree and withdraws this same regulation some months later, as R. thinks. If the second decree speaks of obligations of the natural law and positive law of baptizing and educating the children, it suffices to understand this too only for "*ad liceitatem*". Requirements of the natural law concerning "*cautiones*" cannot make the marriage invalid. If two pagans who know only the natural law get married, there will be danger that the one partner seduces the other partner to sins against the natural law, then their marriage would be invalid! But this may happen in most marriages amongst pagans. But the Church generally considers the marriages amongst pagans as valid marriages. If the impediment falls, the obligations of the *cautiones* or *cautelae quoad validitatem* fall too. Something which does not exist cannot have an effect. "Agere sequitur esse". Jone, *o.c.*, ad Can. 1070, § 1, says: "Protestants are bound by divine law, which forbids them to expose themselves or their children to the danger of faith and morals; but this divine law makes the marriages only illicit, not invalid".

9. The Code Commission was asked: Whether the persons born of non-Catholics, mentioned in Can. 1099, § 2, are bound, according to Can. 1070, by the impediment of disparity of cult when they contract marriage with an unbaptized person. Reply: *In the affirmative* (Code Commission, 29 April, 1940, quoted from *The Australasian Catholic Record*, vol. 34, p. 76). If such persons were not bound by the form (ordinary or extraordinary) but were still bound by the impediment, why should persons bound to the extraordinary form (Can. 1098) be freed from the impediment?

10. It is a grave omission that R. does not mention the decision of the Holy Office for Spain in 1943, concerning marriages during the civil war. Rigatillo, S.J., *Jus Sacramentarium*, is not mentioned in the list of literature. "Sic durante recentiore bello hispanico, in regione a communistis occupata, innumera matrimonia contracta fuerunt coram auctoritate civili aut militari, aut solis testibus, absque parocho vel sacerdote delegato, qui haberi non potuerant (c. 1098). Contrahentes multi quidquid religiosum erat contemnebant, nec umquam coram sacerdote contraxissent; alii ex errore putabant tale matrimonium non valere; sed quoniam aliter contrahere non poterant, ita contrahebant, parati ut, occasione data, rem cum Ecclesia componerent; alii animum coram parocho comparendi forte non habebant. Haec matrimonia, secluso alio impedimento, pro-

nuntiavi valida; nam consensus matrimonialis erat, nupturientes volebant fieri maritus et uxor; forma autem ordinaria tunc eos non obligabat. Plures sic coniugati se separarunt et novum matrimonium contrahere voluerunt, contendentes primum fuisse nullum. Id impossibile iudicavi (footnote: Sal Terrae, 1938, p. 145, 294)".

" *Decisio S. Officii.* Quare doctrina confirmata fuit a S.O. 9 iun. 1943 in responsis ad Vicarium Generalem Tarraconensem: 1) Quid sentiendum de his matrimoniis? 2) Quatenus valida censeantur, utrum procedendum sit via gubernativa, vel potius iudiciali, quoties aliquod dubitandi solidum fundamentum adfuerit ".

" Resp. a) *Quoad impedimenta:* firmis iis de quibus c. 1990, pro caeteris casibus fiat processus regularis. b) *Quoad consensum:* praesumitur adfuisse consensus requisitus pro validitate; quod si in casibus particularibus oppugnetur, fiat regularis processus ad normam iuris. c) *Quoad defectum formae:* fiat regularis processus, habita ratione etiam c. 1098 " (Rigatillo, *Jus Sacramentarium,* ed. 2., n. 1328).

The *S. Congr. de Sacr.* gave special faculties to the Ordinaries in Spain on January 13th, 1937, concerning the form (Rigatillo, *o.c.,* n. 1381). But apparently nothing was provided in these faculties for cessation of impediments. It is quite clear from this reply of the Holy Office that the war-marriages in Spain were invalid if a diriment ecclesiastical impediment was present. This is contrary to the opinion of the cessation of diriment ecclesiastical impediments in extraordinary circumstances. It is contrary also to the opinion of R. that the concessions for China can be extended to other countries and even for cases of the past.

11. The reply of the Holy Office to the question of the Vicar Apostolic of Medan (Sumatra) of January 1955 is unfortunately put in the footnote and small print and can be easily overlooked. This is the case from Medan (R. p. 66): The marriage was celebrated during the war according to Can. 1098 but with the impediment of disparity of worship. The pagan party promised to become a catholic and the *cautiones* were given. When the missionary returned in 1950, he thought that the marriage was invalid because of the impediment of *disp. cultus.* He gave dispensation and married them in *forma canonica.* The woman was baptized in 1952. The partners separated in 1954. Now the missionary discovered that the partners were blood relations in the third degree of the collat-

eral line. This was not known in 1950 and was not dispensed from. The question was put to the Holy Office in 1955 whether this marriage was valid. The answer of the Holy Office was: "Ad rem notum facio Excellentiam tuam Rev. mam declarare posse nullum matrimonium de quo supra, ad normam can. 1990, dummodo certo constiterit celebratum fuisse sine dispensatione ab impedimento consanguinitatis in tertio gradu lineae collateralis". One may ask why the impediment of *disp. cultus* should have ceased in the war-marriage, but not the *impedimentum consanguinitatis* (cf. this paper n. 1, *supra*). This answer of the Holy Office too is a proof that the concessions for China cannot be extended to other countries and to cases of the past. R. says at the end of his work, p. 102: "Eadem vero principia ad alia quoque impedimenta iuris ecclesiastici, a quibus Ecclesia dispensare solet, valent applicari, etiam extra loca missionum, quando nempe eaedem circumstantiae extraordinariae habentur". But this cannot be reconciled with the reply of the Holy Office for Medan.

12. A review of R.'s work was published in *Theologisch-praktische Quartalschrift*, Linz, 1957, p. 168. One cannot agree with this optimistic review. The Church provided for emergency cases in Can. 1043-1045 concerning impediments, and in Can. 1098 concerning the form. The Church must have had grave reasons not to provide for emergency cases of Can. 1098 in connection with diriment ecclesiastical impediments. Canonists who admit the cessation of impediments certainly express the wish that the Church should provide for extraordinary conditions. But so far the Church has done this only for China.

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JURISPRUDENCE IN CANON LAW *

The object of this paper is an attempt to determine the authority of the Decisions of the Holy Roman Rota, their value as a guiding norm and, in a limited number of instances, their binding force for other ecclesiastical Courts. It aims to establish the proper place and the exact weight of Roman jurisprudence in Canon Law.

Needless to say, little can be drawn from the text of the Code itself. It contains but one direct reference to the binding force of judicial sentences, when it declares, under canon 17 § 3, that an authentic interpretation " given by way of a judicial sentence . . . has not the force of law and binds only those persons and affects those matters for whom and for which it was given." The only other provision in the Code having any relation with this particular matter will be found in canon 20, where the legislator lays down the principle of suppletory or supplementary law, in a case where there is a real deficiency in our system of legislation. The canon reads, " If a general or particular law contains no explicit prescription concerning a case, the rule for deciding such a case must be taken, . . . from [among other sources] the manner or style and practice of the Roman curia . . . ;—*a stylo et praxi Curiae Romanae.*" We know that under those words is included the " *auctoritas rerum similiter judicatarum* " or the authority of matters adjudged in the same manner. But, one may say, does this canon give a solemn consecration to all Roman decisions without distinction? What about the authority of jurisprudence in ordinary and daily cases, which do not come under the previous classification? Maroto [1] appears to apply the rule stated in canon 20, and this not only when there is a deficiency in the law, but also when there is hesitation as to the proper meaning of a legal prescription, thereby granting full recognition to the jurisprudence established by the Roman Tribunals. It has been repeated that the original schema of the Code included, under canon 20, an explicit reference to Jurisprudence as a supple-

* Address delivered by the Very Reverend Arthur Caron, O.M.I., Dean, School of Canon Law, The University of Ottawa, Ottawa, Ontario, Canada, at the Mid-West Regional Conference of The Canon Law Society of America, held April 30-May 1, 1957, at the University of Notre Dame, Notre Dame, Indiana.

[1] *Institutiones Juris Canonici ad normam novi Codicis,* 3 ed., vol. I, n. 343.

mentary source of law, but that the words proposed "*a serie uniformi sententiarum judicialium*" were held to be superfluous and were left out, because already found in the phrase "*a stylo et praxi Curiae Romanae*".

Notwithstanding the apparent silence of the Code, all canonists, whether before or after the promulgation, do attribute a major importance to the decisions rendered by the Rota and do not fail to stress the influence exercised by the Roman Tribunals in the interpretation and the evolution of Canon Law. Unfortunately, very little literature can be found on the subject. Except for one or two paragraphs summarizing, with slight variances, a not too precise common opinion, most commentators do not dwell on the problem, and very few authors, if any, have written *ex professo* treatises on ecclesiastical jurisprudence.

I must confess that a long period of formation in the rigorous methods, proper to a system of written law, and years of study and pondering over the text of the Code had accustomed me to somewhat belittle the authority of jurisprudence and made me rather diffident with regard to Court Decisions in general. Further investigation, conducted in later years, coupled with a regular and more attentive contact with the published decisions of the Rota, have awakened in me a keen interest in the constructive work performed by the Higher Ecclesiastical Tribunals and forced me to realize the importance of jurisprudence along with the wise contribution which our present legislation owes to the eminent Church judges of the past.

My purpose is to stress this point and to show to what extent a practical use can be made of the jurisprudence established by the Rota in particular. As a conclusion to my remarks, I will try to set down a few clear propositions, which may serve as suitable rules for judges sitting in Ecclesiastical Courts and engaged in the difficult task of ministering justice.

In order to fully understand the problem, one must know the historical background, lying behind the conclusions accepted by the canonists of to-day. Under the Roman System, Justinian in the law *Nemo* [2] had laid down the rule that the judges were to render justice by following the laws and not by following examples set by others, although admitting two exceptions to this rather rigid prin-

[2] "*Non exemplis sed legibus judicandum est.*"

ciple. The first one concerned the decisions rendered by the Emperor in person; the second concerned the authority of matters adjudged in the same manner, "*auctoritas rerum perpetuo similiter judicatarum*". In such cases, the example set could be followed safely and had to be followed.

This principle of Roman Law was introduced in Canon Law and recognized as an obligatory rule in Ecclesiastical Tribunals between the VI and XV Centuries. Consequently, the decisions rendered by the Pope in person were binding upon all Courts in similar cases, and an established jurisprudence (which, as more commonly taught, required two or three identical sentences) was equally binding upon judges in the ecclesiastical forum.

Near the end of the XV Century, the doctrine of the "*auctoritas rerum perpetuo similiter judicatarum*" is replaced by the authority of the "*Stylus Curiae*" which, on the whole, retains the same legal power under not too different conditions.

Originally the style of the Curia meant the method of proceeding in ecclesiastical causes and dispatching apostolic documents, including the manner of writing or the consecrated *formulae* used in Chancery replies. Later, after a slow process of evolution, the expression came to signify not only the manner of writing and the wording of the decisions, but also the solutions themselves handed down in cases of litigation.[3]

Following a period of dispute and hesitation among canonists concerning the weight of the *Stylus*, Suarez finally proposed a theory which was accepted by most of his followers, Laymann, Barbosa, Pirhing, Leurenius, Pichler, I. B. de Luca, Reiffenstuel, Schmalzgrueber. It was agreed that the style of the Curia did not have force of law, unless confirmed by an act of the legislator or by custom. This did not mean that all authority was refused to it; on the contrary, it was held that the *Stylus Curiae* should be followed because wisdom so dictates, even if it does not constitute a strictly legal ruling. It was equally recognized that the style of the Curia,

[3] F. Suarez, *De Legibus*, L. VII, c. 5, n. 3; P. Laymann, *Jus Canonicum*, In c. 11. *Ex litteris*, X. I. 2. *De Const.* n. 4. et In c. 19. *In Causis*. X. II. 27. n. 4; A. Barbosa, *Collect. D.* X. I. 2. c. 11. n. 4; E. Pirhing, L. I. tr. 4. S.I. § 1, n. 3; P. Leurenius, *Forum Ecclesiasticum*, L. I. t. 4. c. 1. q. 369; V. Pichler, *Jus Canonicum*, L. I. t. 4. § 1, n. 6; I.B. de Luca, *Theatrum, De Judiciis*, disc. 35. n. 70 et disc. 30. n. 20; A. Reiffenstuel, L. III. tit. 4. § 3. n. 77; Schmalzgrueber, P. I. tit. 4. n. 1.

whenever approved by the lawmaker or by custom, had force of law only in the Curia where that particular manner of proceeding had been in usage; not in other Curias or other tribunals.[4]

If the Suarezian doctrine restricted the authority of the style of particular Curias, which is quite logical, no such limitation existed as regards the *Stylus* of the Roman Curia. Before the *Decretum* of Gratian, under the *Decretum* and ever since a very special and universal authority has been accorded to the manner and method used by the Mother Church and to the decisions rendered by the Pontifical Curia. It was already common teaching in the late XIII Century that all were obliged to the style accepted in the Roman Curia, at least in matters of Faith and of sacraments, in cases of deficiencies in particular law or whenever the Pope, explicitly or implicitly, imposed the curial manner.

The value attributed to the decisions of the Rota is but an application of the preeminent authority exercised by the Roman Dicasteries in general.

Cardinal Zabarella seems to be the first authority to mention specifically the authority of the Rota. Followed by several others, Alexander Tartagnus, Joannes ab Imola, Decius, he states that Rotal decisions have a purely doctrinal value, creating a probable opinion, something like the expert teaching of a doctor, although, adds Felinus Sandeus, carrying more weight than the mere authority of doctors.

In no case, it was commonly held against Fagnanus, do the decisions of the Rota constitute a legal rule binding other tribunals, which retained their freedom of judging otherwise. This was justified by the fact that such decisions lacked the authority of the legislator, having received no confirmation from the Pope. Moreover, the Rota itself did not consider its own Tribunal as bound by previous decisions and did not hesitate to change the interpretation formerly adopted.

In short, from a canonical point of view, our problem, as it stood in the period immediately preceding the promulgation of the Code, can be summarized in the three following propositions:

> 1°—the jurisprudence of the Rota carries nothing more than a doctrinal and probable authority, wholly dependent on the value of the reasons on which the decisions are based;

[4] Lefebvre Ch., *Les pouvoirs du juge en droit canonique*, p. 234-243.

2°—the decisions handed down do not oblige other tribunals, and for that matter the Rota itself, unless they have become a real customary law, fulfilling all conditions (time, uniform and repeated sentences) required for a custom:

3°—one should not easily set aside the decisions of the Rota and choose to follow his own personal opinion, unless he has very serious reasons, because the great knowledge and the integrity of the canonists, who are members of that High Court, constitute guarantees against erroneous or inaccurate interpretations.

This brings us back to the Code and the period that has followed. It seems to me that the norms arrived at by the pre-Code canonists remain the rule to be applied now as it was under the old law. Nothing has happened that would justify a change.

A brief survey of the Code commentaries do show a broad consensus of opinion among authors concerning the authority of the Rotal decisions along the lines commonly agreed upon before the promulgation of 1917. But, I have always felt a little uneasy when consulting them, because of what appeared to me to be a lack of accurateness and of precision.

Maroto [5] summarizes his opinion in the following words: "After an adequate number of sentences and a long enough space of time and other conditions usually involved in establishing custom, jurisprudence comes into its own and, if it comes from Supreme Tribunals, it is commonly held that inferior tribunals must follow that jurisprudence."

Cicognani [6] writes: "Jurisprudence, taken in the above sense, has great weight with the tribunals, the judges and jurists, but before it can constitute a true source of law it must possess certain requisites. Thus, it must be lawfully prescribed, that is, it must be a firm and fixed manner of judging. Jurisprudence acquires this characteristic after an adequate number of uniform decisions have been rendered by the competent tribunals, and after certain other conditions (e.g., of time) that are usually required for prescribing a custom, a Stylus and the like, have been more or less fulfilled. Since the jurisprudence of the Dicasteries of the Roman Curia has acquired these

[5] *Institutiones Juris Canonici,* vol. I, n. 466.

[6] *Canon Law,* 2 ed., p. 109.

necessary notes, it follows that all inferior judges are bound to observe it. In this the jurisprudence of the Roman Curia differs from its Stylus, for the Stylus of the Roman Curia is not always obligatory outside the Roman Curia, as was explained above."

Michiels[7] says: "The ecclesiastical doctrine commonly admits the so-called "*auctoritas rerum perpetuo similiter judicatarum*"; or, in other words, it is admitted that from similar sentences rendered by the Roman Tribunals with due frequency in a constant and uniform manner, during an adequate space of time, arises a kind of customary objective rule having the force of law." Further he adds: "Although a single decision rendered by the Roman Curia does not constitute a rule of Style, it is quite commonly admitted by authors that such a decision offers a practically safe suppletory norm for similar cases and, if it were authentically proposed or published in the *Acta Apostolicae Sedis*, it should be followed."

Augustine[8] states: "Although such decisions, especially if they have emanated from the Roman tribunals, must be received respectfully, and may be followed securely, yet their force does not extend so far as not to admit of a contrary verdict if the reasons are strong enough to upset former decisions."

Van Hove[9] declares in a short statement: "It is now more commonly admitted that there is an obligation for inferior judges to follow the jurisprudence of the Roman Curia, when, on account of custom, it has become a *Stylus juris*. But such an event must not be easily admitted."

Most of the other commentators do not discuss the problem or simply note in passing the binding authority of the Rotal jurisprudence when it has been confirmed by custom.

Before coming to the practical conclusions promised at the outset, I would like to deal briefly with the question raised above in connection with the interpretation of canon 20 and the canonical value given by this canon to the suppletory sources of law and, in a special way, to the style and practice of the Roman Curia.

Canon 20 concerns exclusively cases where there is a deficiency in the law—"*Si certa de re desit expressum prescriptum legis*"; and it has nothing to do with the more general problem of the authority

[7] *Normae Generales Juris Canonici*, 2 ed., vol. I, p. 627.

[8] *A Commentary on the New Code of Canon Law*, I, p.100.

[9] *De Legibus Ecclesiasticis*, 1 ed., n. 326.

of jurisprudence in Church matters. When a case not covered by law arises, the Superior and the judge are directed to have recourse to certain supplementary sources for an applicable rule. In consequence, this rule acquires, in virtue of canon 20, true force of law, becoming a real legal norm for the parties involved in the case, although carrying no juridic authority whatsoever in the nature of a general law.[10] In other words, it does not constitute "a legal precedent for inferior judges" as Schmidt [11] has so appropriately stated.

The Code has abstained from defining the authority of the *Stylus Curiae* and of the Roman judicial decisions, when these are not used as a suppletory source of law, and has equally refrained from determining the conditions under which a simple existing practice (*Stylus facti*) becomes a legal and binding rule (*Stylus juris*), perhaps because this matter was properly a question of customary law to be governed by canons 27 and 28, as it is noted by Van Hove [12] in his commentary.

The *Stylus facti* designates merely an actual practice, while the *Stylus juris* means a manner used in the Roman Curia that has acquired force of law and, therefore, obligatory in the universal Church. In my mind, it seems evident that the Code in canon 20 refers only to the *Stylus facti*, because, when the style of the Curia, applicable to a particular affair, becomes obligatory in the Church, there remains no gap in the law. I can then see no necessity of resorting to supplementary sources, there being in the legislation some legal provision that must be followed.

If these principles are agreed upon, it is not too difficult to draw up a few plain propositions, summing up the common doctrine accepted by the canonists regarding the authority of the sentences rendered by the High Roman Tribunals and by the Rota in particular.

Two possibilities may arise: either it is a case where recourse to supplementary sources of law becomes necessary, because the existing legislation does not provide an explicit rule, or it is a case where no strictly legal deficiency appears in the legislation.

[10] Michiels, G. (O.F.M. Cap.), *Normae Generales Juris Canonici*, I, p. 588.

[11] *The Principles of Authentic Interpretation*, p. 239-240.

[12] *De Legibus Ecclesiasticis*, n. 326.

First possibility: there is a deficiency in the law.

Rule:—If there is no explicit provision in the law concerning an affair, the rule for deciding the case must be taken from the suppletory sources enumerated in canon 20, and, specifically, from the judicial decisions of the Roman Tribunals, assuming they do supply a principle of solution.

It is perhaps expedient to repeat here Michiels' statement, already partly quoted above: "Although a single decision rendered by the Roman Curia does not constitute a rule of Style, it is quite commonly admitted that such a decision offers a practically safe suppletory norm for similar cases and, if it were authentically proposed or published in *Acta Apostolicae Sedis,* it should be followed. . . . Such a suppletory norm is not only safe and should be followed, but occasionally becomes obligatory for similar cases", because no other rule can be found and recourse to a supplying principle becomes necessary. Much could be added in favor of this last assertion, but it is too strongly disputed to accept it without reservation. Most authors require at least two decisions to establish a rule of Style.

Second possibility: there is no deficiency in the law, but there are explicit legal provisions existing.

Rule No. 1:—The decisions of the Rota, after an adequate number of sentences have been rendered and after certain other conditions (e.g. time), usually required for prescribing a custom, have been fulfilled, become customary law and all inferior judges are bound to follow it.

Before the Code, several eminent authors have held that two or three uniform decisions rendered within ten years were sufficient to establish a custom, obliging other Courts to adjudge in the same manner, but Böckhn and Zech fail to see how two identical sentences suffice to create a custom. The recent canonists are rather reserved and generally silent on this point, although they seem to require a greater number of decisions spread over a longer period of time, perhaps 30 years, to establish jurisprudence binding inferior Tribunals. Van Hove and Cicognani warn us to be very cautious before concluding to the existence of a custom in judicial matters.

It is evident that a Rota decision formally approved and pro-

posed by the Pope would have the force of law and would oblige all Tribunals to judge accordingly.

> *Rule No. 2:*—The jurisprudence of the Rota, unless confirmed by the supreme legislator or by established custom, does not constitute an obligatory ruling, which the inferior judges are bound to follow.

In such circumstances, there exists no juridic obligation and, with serious reasons, anyone remains free to adopt a solution differing from the one proposed by the Rota. The tradition prevailing under the old law may be said to be unquestionable on this point, and the principles contained in canon 6 suggest no argument for a change in the theory. Moreover, for that matter, the Roman Tribunals show us that they do not consider themselves as bound by their own previous decisions. Oesterle, in a learned article published in the *Dictionnaire de Droit Canonique*,[13] has discussed at length the hesitations and variations of the Rota on the important question of impotency.

> *Rule No. 3:*—Even when not binding, if several uniform sentences have been rendered, the decisions of the Rota shall be highly valued by the inferior Tribunals, and they shall be careful not to decline to accept the example set, unless they have very convincing reasons of deciding in a different manner.

It is only prudence and wisdom for an inferior judge, in case of doubt of law, to accept the interpretation adopted by the Rota in several identical decisions. When the sentences of Roman Tribunals are not uniform, he is, after a serious study of the law itself, to weigh the arguments on which the conflicting decisions are based and form his own judgment according to the dictates of his conscience.

Some sentences of the Rota are published occasionally in the official organ of the Holy See, the *Acta Apostolicae Sedis*. Unless confirmed *in forma specifica* by the Sovereign Pontiff, juridically speaking, they do not obtain force of law and do not bind the inferior Tribunals, carrying no more authority than the non-published decisions of the Roman Court. To grant them a strict legal value in

[13] S.v., *Impuissance*, col. 1272-1274.

the universal Church, besides promulgation in the official Commentary, a formal approval from the supreme legislator is required. Of course, these decisions, morally speaking, carry an exceptional weight, for the simple reason that they seem to have been published at the request or after special approval of the Pope with the intention that they serve as a guide for Ecclesiastical Tribunals.

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Decrees and Decisions

CANONICAL

BEATIFICATION PROCEDURE

On April 9, 1957, the Congregation of Sacred Rites issued a decree concerning the examination of the writings of the Servants of God whose causes are being considered for formal introduction. Those consultors of the Sacred Congregation who are called "*Officiales Praelati*" must now be present at the ordinary session at which the written works are discussed, in addition to the *Promotor generalis fidei* and the *Subpromotor*, and they must read their opinions on the writings in the presence of the Cardinals of the Congregation. (A similar rule was established on November 25, 1931, with reference to the next two steps in the introductory procedure, namely, the sessions for the discussion of the informative process and of the process *super non cultu* prepared by the local Ordinary.)

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CANONS FOR THE ORIENTAL CHURCHES

By an Apostolic Letter, *Cleri sanctitati*, given *motu proprio* on June 2, 1957, Pope Pius XII promulgated 558 additional canons of the Code for the Oriental Churches. The canons are divided into five titles: I. *De ritibus orientalibus;* II. *De personis physicis et moralibus;* III. *De clericis in genere;* IV. *De clericis in specie;* V. *De laicis.* With the law governing religious (promulgated February 9, 1952), these canons complete the law *De Personis.* The new canons go into effect on the feast of the Annunciation, March 25, 1958.

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SUPPRESSION OF REPORT ON CONFIRMATION

According to a decree of the Sacred Congregation for the Discipline of the Sacraments, dated July 1, 1957, local Ordinaries are no longer obliged to submit an annual report on the administration of Confirmation by extraordinary ministers to those in danger of

death from illness. (The annual report had been required by the decree *Spiritus Sancti munera* of September 14, 1946.) At the same time the Ordinaries were reminded to continue their vigilance over the administration of this sacrament by extraordinary ministers and to approach the Sacred Congregation if necessary to correct any abuse in this matter.

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ADMISSION OF SEMINARIANS

On July 12, 1957, the Sacred Congregation of Seminaries and Universities directed that Bishops should abstain, in general, from admitting to their seminaries students who have voluntarily left the seminary of any diocese or who have been dismissed by the superiors of seminaries for any cause. Bishops desirous of admitting such candidates must approach the Sacred Congregation for authority to do so, in addition to observing Canon 1363, § 3.

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HUNGARIAN CLERGY

On July 16, 1957, the Sacred Congregation of the Council prohibited Hungarian priests, both secular and religious, from seeking or accepting the office of deputy or any other office in the Hungarian parliament. Those holding such offices were commanded to resign within a month and, in the meantime, to cease attending parliamentary sessions or performing related duties. The penalty for violation of the decree is excommunication, specially reserved to the Holy See, incurred *ipso facto*.

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RELIGIOUS IN MILITARY SERVICE

On July 30, 1957, the Sacred Congregation of Religious issued a decree concerning religious who are bound to perform military service in cases where the civil power fails to observe the privilege of clerical immunity. Its eight articles cover such matters as the suspension of temporary vows during service, the juridical condition of the religious, the obligations of poverty, the period of probation after military service. Article 2 provides that no one may be validly admitted to perpetual profession while subject to military service.

* * * * *

USE OF FULL VESTMENTS

The Congregation of Sacred Rites issued a declaration on August 20, 1957, leaving to the prudent judgment of Ordinaries the question of manufacturing and using vestments of ancient form. At the same time local Ordinaries were directed to safeguard the holiness and beauty of divine worship in this matter. (By this declaration the decrees of February 11, 1863, and December 9, 1925, which had reserved decisions concerning the more venerable forms of vestments to the Apostolic See, were relaxed.)

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ROTAL SENTENCES—1956

In the issue of the *Acta Apostolicae Sedis* dated August 27, 1957, the Sacred Roman Rota listed 261 cases in which a definitive sentence was given in the year 1956.

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UNITED STATES MILITARY VICARIATE

The Holy Father on September 8, 1957, erected the Military Vicariate of the United States of America and provided that each Archbishop of New York will also hold the office of Military Vicar. According to the decree of the Sacred Consistorial Congregation, the Military Vicar will be assisted by auxiliary bishops, by delegated chaplains (major chaplains, with the duties of Vicars General), and by military chaplains (minor chaplains, with the duties of pastors).

In addition, those subject to the authority of the Military Vicar are enumerated, the relation of the Military Vicar's cumulative jurisdiction with that of the local Ordinaries of military installations is defined, and the observance of canon 1097, § 2, in the celebration of marriages is enjoined. The Tribunal of first instance for the Vicariate is the Metropolitan Tribunal of New York, of second instance the Metropolitan Tribunal of Philadelphia.

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BLESSING FOR RADIO STATIONS

On October 24, 1957, the Congregation of Sacred Rites approved a new formula, consisting of canticles, psalm, collects, and Te Deum, for the blessing of a radio station, and directed that the blessing be inserted in the Roman Ritual.

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NEW INDULGENCES

The Sacred Penitentiary, Office of Indulgences, has announced the following concessions: an indulgence of three years for the recitation of a prayer to Our Lady of Lourdes composed by Pope Pius XII (May 10, 1957); an indulgence of three years for the recitation by physicians of a prayer also composed by the Holy Father (May 10, 1957); a plenary indulgence under the usual conditions for prayers and meditation on twelve Sundays in honor of the mysteries of Our Lord's Infancy (June 4, 1957).

The Sacred Penitentiary, Office of Indulgences, announced on November 6, 1957, the concession of the following indulgences for reciting a prayer, composed by Pope Pius XII, for vocations to the priesthood: ten years' indulgence for each recitation; plenary indulgence, under the usual conditions, if the prayer is recited daily for an entire month.

FREDERICK R. MCMANUS

CIVIL

JURIES

It has always been held prejudicial to the rights of the defendant in a criminal case to poll the jury before they have reached a verdict as to their present position on the verdict. A Federal District Judge called the jury to the courtroom and asked "Without telling how you stand . . . is there a prospect of your agreeing on a verdict?" In the case of U. S. vs. Mack decided on October 3, 1957 the U. S. Circuit Court for the Seventh District held that such a question was not prejudicial to the rights of the defendant.

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JUVENILE COURT RECORD

The defendant was a Marine being tried by a court-martial for desertion. Having testified on his own behalf, the prosecution cross examined the defendant marine about acts of moral turpitude committed while 14 years of age, and which had been processed in a Virginia juvenile court. On October 4, 1957 the U. S. Court of Military Appeals held that such cross-examination should not have

been permitted. It would disturb, upset and nullify the protection afforded minors by establishing juvenile courts to handle such juvenile behavior. U. S. vs. Roark.

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TAX EXEMPTION

The Ethical Society of Washington, D. C. was held to be a religious society within the meaning of the term as used in law for tax exemption purposes. The society does not profess a Supreme Being, but is committed to a set of principles of living. The fact that such a society would not fit the usual definition of a religion does not prevent it from being such in contemplation of law, and thus to share in the tax exemption granted to religious societies. Decided on October 17, 1957 in CADC.

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PASSPORTS

In the case of Dayton vs. Dulles it was held that the Secretary of State need not disclose confidential information which was the basis for denying a passport. It is within the province of the Secretary of State to decide if the disclosure of such information would be detrimental to the security of the nation. Decided October 25, 1957 in CADC.

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OBSCENE MATTER

The Tariff Acts of the United States have a ban upon the importation of obscene matter. In the case of U. S. vs. 31 Photographs, decided on October 31, 1957, by the U. S. District Court for Southern New York, it was held that this ban did not apply to photographs imported by the Indiana University Institute for Sex Research. It was not the province or intention of the legislature to determine what may be studied scientifically by scholars.

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INSANITY

The Supreme Court of Nevada has held that their test for insanity is whether or not the defendant knew the nature of his act, or knew that what he was doing was wrong. The court is to use this rule alone in deciding sanity cases, and not the standards which are used by psychiatrists in the medical field. Sollars vs. State, decided October 18, 1957.

In the case of the People vs. Johnson decided by the N. Y. CTY. CT. on November 27, 1957, it was held that New York must follow the M'Naghten rules in testing murder defendant's plea of insanity. The testimony of medical experts that such rules are antiquated in the light of modern medical evidence is a question to be presented and acted upon by the legislature, and not by the courts of law.

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HEARTBALM STATUTE

The Pennsylvania Heartbalm Act does not deprive an 80 year old man of his right to recover from his 30 year old ex-fiancée substantial gifts of cash that were given to her on the condition of marriage. The marriage of the fiancée to another entitles the plaintiff to recover the sums advanced. Parlicic vs. Vogtsberger, decided November 18, 1957 by the Pennsylvania Supreme Court.

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SUNDAY LAWS

The laws of Pennsylvania permit the local community to determine for itself whether to permit moving picture theatres to operate on Sunday. In the case of Comm. vs. Grochowiak, decided November 12, 1957 by the Superior Court of Pennsylvania, it was decided that such local option laws do not violate the Federal guarantees of free speech and the press.

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BLOOD TESTS

The Pennsylvania compulsory blood test law is available only in cases of fornication and bastardy, or for neglect to support a bastard. The statute was passed to enable the court to protect men who are accused of paternity of a child born out of wedlock. The statute can not be invoked to force a blood test in the case of a husband's attempt to attack the legitimacy of a child born to his wife during wedlock. Comm. vs. O'Brien, decided November 18, 1957 by the Pennsylvania Supreme Court.

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PINBALL MACHINES

The Ohio Supreme Court has ruled that a municipal ordinance prohibiting pinball machines, no matter to what use they are put, is

not a violation of due process. Such statutes need not be passed for the prohibition of gambling alone. Benjamin vs. Columbus, decided December 18, 1957.

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USURY

The Supreme Court of the State of Arkansas has ruled that carrying charges in excess of 10% for installment buying do violate the Arkansas prohibition against usury. The fact that the interest alone without accompanying charges was less than 10% will not avoid the prohibition. Solan vs. Sears, decided December 23, 1957.

JOHN J. MCGRATH

Book Reviews

POTESTAS ORDINARIA ET DELEGATA. Ludovicus Bender, O.P. Desclée & Co. Editori Pontifici, Roma, 1957. Pp. vii-206.

The author of this book is a well known professor of Juridical Science at the Angelicum in Rome.

The canons discussed in this book are some of the more important laws in fundamental Canon Law. Ordinary and delegated power are items which must be understood thoroughly if one expects to be proficient in Canon Law. Ordinary power is not too difficult to understand but the ramifications of delegated power can be confusing. It is, therefore, essential that delegated power be known under its various aspects. Fr. Bender succeeds in explaining both ordinary and delegated power in a way that is clear and interesting.

In turn, the author explains the divisions and terminology of power, delegation and subdelegation, interpretation and proof of jurisdiction, and the exercise and restriction of jurisdiction. These subjects are followed by a discussion of plural delegation and the extinction of jurisdiction.

One of the more interesting discussions is the author's consideration of supplied jurisdiction. All commentators on this part of the Code of Canon Law give ample space to this subject. The subject itself undergoes a maze of interpretations. The author dismisses opinions which cannot be reconciled with the history of common error. This is the proper course to take, for the law in canon 209 does not contain much change from earlier law. Hence, the author states that probable and prospective error will not suffice for supplied jurisdiction. He demands actual error before the law can be applied. He is generous, however in the computation of the number of people who must be in error.

The book concludes with a discussion of the necessity of notification of delegation and its acceptance.

There is a short index. This book will be useful to professors and students of Canon Law.

FIRST SYNOD OF THE DIOCESE OF HONOLULU. Celebrated by His Excellency the Most Reverend James J. Sweeney, D.D., Bishop of Honolulu, April 24, 1957, Our Lady of Peace Cathedral, Honolulu. Pp. 38.

Conflicting and overlapping of jurisdiction can become a source of serious problems in territories under diocesan control. In dioceses where the major number of the clergy is religious and, in addition, some clerics are subject to service regulations, uniform diocesan law is difficult to formulate. The Synod of Honolulu, however, successfully masters this task.

Pastors and confessors are properly the subjects of a diocesan Synod. The Synod of Honolulu through several statutes establishes the norm of possession of a parish, the duties of the pastor where no hospital chaplain is provided, the visitation of the sick of the parish, the obligation of prompt response to mail and the time for vacations. Confessors are considered in several statutes. The term of office is definitely established. Temporary faculties are provided for. In statute 47 apparently the Chancellor is considered the delegate of the Ordinary without any previous statement to this effect in the actual statute. According to the Code of Canon Law, the Chancellor is an archivist and official notary. He is not in general law the delegate of the Ordinary. He can, of course, be constituted such, but this should appear clearly in particular statutes.

An excellent regulation is found in statute 17. This provides that transportation expenses when a priest is transferred within the diocese be paid by the parish from which the priest is transferred. In view of the small salary of clerics, this is a humane provision.

On the whole this is a satisfactory Synod. It can be profitably consulted by Bishops who plan to celebrate a Synod.

DIE GEISTLICHE GERICHTSBARKEIT DES ERZBISCHOFS VON MAINZ IM THÜRINGEN DES SPÄTEN MITTELALTERS. Georg May. Erfurter Theologische Studien, 2. St. Benno-Verlag GMBH, Leipzig, 1956. Pp. xxiii-330.

This book is another excellent volume published under the direction of the University of Erfurt. The directors of these publica-

tions deserve the commendation of scholars. It is the reviewer's hope that they may long continue their satisfactory work.

Dr. May's treatise concerns the jurisdiction of the Archbishop of Mainz in the latter middle-ages. Various types of jurisdiction and their development are sufficiently described and clearly explained. Separate sections are devoted to the items regularly found in the broad sweep of jurisdiction. Laws concerning marriage and processes are adequately considered. The chief judge is subjected to extended examination and the minor officials of the court are described so that the whole pattern of the judicial structure is at once apparent.

There is no index. But the bibliography is extensive. Published and unpublished manuscripts are noted. As should be expected, almost all the reference works are in German.

IRRTUM UND TÄUSCHUNG BEI DER EHESCHLIESSUNG NACH KANONISCHEM RECHT. Dr. Heinrich Flatten. Verlag Ferdinand Schöningh, Paderborn, 1957. Pp. 77.

Possible error and deception are important items to be considered in contracts. Canon 104 contains the law of the Code of Canon Law on error; and deception is usually equivalent to fraud or *dolus*. It is useful to have at hand a study of the development of these items in relation to the contract of marriage.

The book reviewed here is not really intended to be a complete study of error and deception, but it does set forth the modern Canon Law. The footnotes to the author's commentary are especially valuable.

Of course, much of the actual doctrine contained in this book has already been considered in other volumes by other authors. But thanks should be given to the present author for his concise treatment.

In the nature of an appendix, the author provides a summary of pertinent law in the various States of Europe. Every State is considered, including Russia and the States behind the iron curtain. Even the small State of Liechtenstein is included. This summary of laws will be useful to canonists who must at times consider the validity of contracts originating in Europe. Information of this kind is not readily found in textbooks.

LEXICON NOMINUM VIRORUM ET MULIERUM. Carolus Egger. Societas Libraria "Studium" ex Officina Typ. Vaticana edidit, 1957. Pp. ix-197.

There is an occasional need for a lexicon of this kind. Translators of official documents and letters are sometimes pressed to find equivalents of personal names. This book will be very useful in selecting the proper equivalent in several languages.

The compiler of these multilingual names extends his work to include five languages, Italian, French, Spanish, English and German. It should, of course, be expected that a few errors would be found in a work of this size but for the most part this lexicon is reliable.

One of the features of this lexicon is the consideration of the etymological origins of some of the names discussed. A number of polysyllabic names are really compounds of simpler terms. These are indicated by the compiler.

Frequently, where a name has a Latin origin, the gender and declension are supplied.

Except for those engaged in constant translation, this book will not be of everyday use. Yet it should be found in comprehensive libraries. It has an additional cultural value for students interested in the origin of names and their development through several languages.

THE RIGHT TO WORK. Dennis Lloyd. Stevens & Sons, Ltd., London, 1957. Pp. 23.

This is a pamphlet of but a few pages, but it considers an important subject. It is not, as one might suppose from its title, a survey of so-called right-to-work laws which are in effect in several States of this country. Rather it is a discussion of the competence of civil courts to take jurisdiction when a union has suspended a member with consequent inability to retain his job.

The author of this pamphlet discusses several cases where a man's right to work to support himself and his family was suspended by order of union officials. Discussion is based upon the natural right to work and the union's right to suspend this right. Eventually, the discussion comes to the point where a decision must be made between the right to work when a member of a union has

violated a rule of the union and the judgment of the union officials in estimating the severity of this violation.

The author admits that the courts are reluctant to assume jurisdiction in cases of domestic societies. But he stresses the point that if natural justice is violated, jurisdiction can be assumed. The basic reason is that no civil society can reject the natural law of justice.

This pamphlet should be read by all who are in the field of union and labor relations. It will give a clearer insight of natural law and of what possible restrictions might be lawfully placed upon it.

NATURALEZA JURIDICA DEL ESTADO DE PERFECCIÓN EN LOS INSTITUTOS SECULARES. per José Maria Setién. Analecta Gregoriana, Vol. LXXXVI. Series Facultatis Iuris Canonici, Sectio B (n.5). Apud Aedes Universitatis Gregorianae, Romae, 1957. Pp. xx-207.

The comparatively new canonical Secular Institute has already given frequent occasion for study and commentary. This work is a study of the canonical nature of the state of perfection in this institute. The volume is one of a series of Canon Law studies at the Gregorian University.

The author establishes a foundation for his precise study in his discussion of the development of the canonical state of perfection. Vows are important here, and the state itself is analysed both in its public and private aspects. Further, the author discusses whether the constitutive elements of the state of perfection are found in Secular Institutes.

The state of perfection in Secular Institutes is not the same as the state of perfection in religious communities. Comparisons between religious Orders, Congregations and Institutes and Secular Institutes must be made before distinctions of importance can be ascertained. Explanations of such distinctions as are ascertainable are well developed by the author.

The power found in a Secular Institute should be clearly defined. While this power resembles jurisdiction, it is by no means jurisdiction. It is rather dominative power sufficient for the conservation and government of the Institute. Two chapters on this subject are well thought out and constructed.

Unfortunately, there is no index. The bibliography is mostly restricted to studies on Secular Institutes. The principal works on this subject are included but there is a notable absence of suitable and pertinent works in English.

DE LAICORUM APOSTOLATUS FUNDAMENTO, INDOLE, FORMIS. Sebastianus Tromp, S.J. Stab. Tip. F. Canella, Roma, 1957. Pp. 33.

This is a useful pamphlet containing a summary of the proceedings of the 1957 meeting on the Lay Apostolate. It is not intended to be more than a summary, but it contains enough to show that this meeting in Rome was a success and indicated progress in this field.

Short as this pamphlet is, it nevertheless is divided into three parts. The first part explains the nature of the Mystical Body. The second discusses the universal priesthood. The third examines the separate aspects of the Lay Apostolate.

This pamphlet is intended for the convenience of priests. It should be made available either in the original Latin or in the vernacular. Dioceses and religious communities would do well to furnish copies to priests.

The table of contents, called here an index, is sufficiently detailed for quick reference.

LE SERMENT. par Bernard Guindon. Universitas Catholica Ottaviensis. Dissertationes ad Gradum Laureae: Series Canonica Nova, Tomus 4. Éditions de l'Université d'Ottawa, 1957. Pp. 246.

This dissertation is another of the satisfactory publications of the Catholic University of Ottawa. It covers the subject of Oaths both historically and in commentary.

The history of Oaths is treated in a broad fashion. Both Jewish and pagan history are considered. In this respect the legal and sacred character of an oath is discussed. Naturally, the importance of an oath in Roman Law is given special attention. All the phases of an oath in Roman Law are sufficiently discussed.

Christian life in the New Testament, in the writings of the Fathers, and in ecclesiastical legislation is the subject of several chapters. Exegesis of a text of St. Matthew is given. The writings of the Greek and Latin Fathers are examined. Ecclesiastical legislation is discussed as it appears in history from the early Councils to the publication of the decretals of Pope Gregory IX.

The second part of this dissertation is devoted to a commentary on the present law on Oaths (cc. 1316-1321). The nature and aspects of an oath are separately treated. Conditions for the validity and liceity of an oath are discussed. The obligation to make an oath, and the cessation of the obligation of an oath are considered.

The author writes with skill on the cessation of the obligation of an oath. This is especially true in his consideration of the use and effect of dominative power on oaths. The use of such power creates some difficulties in regard to minors, but the author meets these difficulties with an honesty that speaks well of his canonical training.

There is no index. The bibliography and annotations are satisfactory. New editions of this work should eliminate the typographical errors found in some of the citations.

EDWARD ROELKER

Chronicle

Father Michael Lensing, O.S.B., was elected fourth abbot of New Subiaco Benedictine Abbey, Subiaco, Arkansas, succeeding the late Abbot Paul Nahlen, O.S.B. The abbatial blessing was conferred upon him on Nov. 21 by Bishop Fletcher of Little Rock.

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Msgr. Joseph Hale, Vicar General of Winona died in St. Mary's Hospital, Rochester, Minnesota.

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Monsignor Frederick Freking, spiritual director of the North American College in Rome, has been named to the hierarchy and designated Bishop of Salina, Kansas.

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Monsignor William Bachmann of Cleveland has been appointed spiritual director of the North American College in Rome.

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Bishop Deardon of Pittsburgh has been named an Assistant at the Papal Throne by Pope Pius XII.

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Monsignor Roelker, Dean of the School of Canon Law at The Catholic University of America, died suddenly at the University on October 29.

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Bishop-elect John Fearns has been named Auxiliary to Cardinal Spellman. December 10 has been set as the day for his consecration.

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Four priests of the Diocese of Grand Rapids have been named Domestic Prelates. They are Monsignors Charles Popell; Thomas Bolger; Edward Alt; and Francis Kupinski.

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Monsignor John O'Grady, secretary of the National Conference of Catholic Charities, has been reappointed as a member of the Advisory Committee of Sheltered Workshops.

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Monsignor Sheridan, President of Mt. St. Mary's College and Seminary, has been named a Protonotary Apostolic by Pope Pius XII.

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Bishop Emmet Walsh of Youngstown celebrated the thirtieth anniversary of his elevation to the hierarchy.

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Four Cardinals, twenty-one Archbishops and one hundred and fifty-four Bishops attended the annual meeting of the hierarchy in Washington, D. C.

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The Diocese of Altoona, Pa., has been renamed the Diocese of Altoona-Johnstown.

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Monsignor Fenton of The Catholic University of America received his diploma as a member of the Pontifical Roman Theology Academy in a meeting of the Academy at Rome.

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Monsignor Joseph Gorham of The Catholic University of America has been named Director of the Commission on American Citizenship of The Catholic University of America.

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The Rev. James Naughton, S.J. has been named executive secretary to the Most Rev. John B. Janssens, S.J. Superior General of the Society of Jesus.

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Bishop-elect Victor Reed of Tulsa has been named Auxiliary to Bishop McGuinness of Oklahoma City and Tulsa.

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The Right Reverend William J. McDonald has been appointed Rector of The Catholic University of America by Pope Pius XII.

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Bishop Clarence Issenmann, former Auxiliary to Archbishop Karl Alter of Cincinnati, has been appointed Ordinary of the Diocese of Columbus.

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Monsignor Howard Carroll, Secretary of the NCWC, has been named Bishop of the Diocese of Altoona-Johnstown.

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Pope Pius XII has appointed Cardinal Mimmi, Archbishop of Naples, to be Secretary of the Sacred Consistorial Congregation.

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Bishop-elect Schladweiler of St. Paul, Minn., has been appointed first Bishop of the newly created Diocese of New Ulm, Minn.

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Bishop-elect Leonard Cowley of St. Paul, Minn., has been appointed Auxiliary to Archbishop Brady of St. Paul, Minn.

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ROMAEUS W. O'BRIEN, O.Carm.

THE CANON LAW SOCIETY OF AMERICA

Annual National Meeting

On Tuesday, Wednesday and Thursday, October 15-17, 1957, the Canon Law Society of America convened for its nineteenth annual meeting, held at the Adolphus Hotel in Dallas, Texas. The registration for the convention revealed a total of about 150 participants, representing numerous archdioceses and dioceses throughout the United States and Canada, and a considerable number of religious institutes throughout the country.

Committee Meetings

On the evening of October 15th the various committees of the Society held meetings preliminary to the meeting of the General Executive Committee. The chairman of each committee reported to the Executive Committee, thus enabling the latter to seal its final plans for the orderly conduct of the actual meetings during the convention. It remained for the various committees to submit their reports to the convention during the opening session on the following day.

Morning Session, October 16th

The first scheduled session convened at 10:35 A.M. The session came to order with a prayer by His Excellency, Bishop James V. Casey, President of the Society. A brief word of explanation and apology was offered by the hotel management for the inconvenience occasioned for some of the attendants at the time of their arrival regarding the assignment of rooms and reservations for them. The President then announced that by unanimous agreement of the Executive Committee all papers read at the convention were to be limited to a half hour, with a half hour allowed also for subsequent discussion. This announcement drew an enthusiastic approval from the assembled members.

His Excellency, the Most Rev. Thomas K. Gorman, as the gracious host for the convention welcomed the canonists to Dallas for their annual meeting. He attached great importance to the work done by the canonists for their bishops throughout the country, and particularly stressed how helpful was the work of the Research Committee, especially for the smaller dioceses. He indicated that a notable improvement was manifest in diocesan chanceries and tribunals in the expediting of the work that fell to their responsibilities.

His Excellency, Bishop Casey, responded to Bishop Gorman's gracious welcome and warm hospitality. He then called for a reading of the minutes of the previous annual meeting, which had been held in Atlantic City, on October 23-24, 1956. The minutes as recorded by the Rev. John P. Connolly (San Francisco) and read by the Rev. John W. Desmond (Joliet) were accepted, without objection or correction, for filing by the Society's Recording Secretary.

Committee Reports

The Rt. Rev. Joseph I. Johnson (Springfield, Mass.), as chairman of the Research Committee, reported the culmination of the work undertaken by the Committee in readying a form for the prenuptial investigation of free status for marriage. Copies of this form were circulated among the Society's membership, and likewise were sent to all diocesan chanceries throughout the country. Bishop Casey indicated that the form as issued by the Committee had no further approval from the Society's Membership than was inherent in their selection of the officers through whom the Committee was ordered to do its work. All in all, the form was submitted as something not beyond an experimental stage, for it was hoped that the bishops themselves might take united action approving some standard form that could be uniformly employed everywhere in the interests of easier certification of any and all legitimate demands in the matter of establishing free status for marriage. Monsignor Johnson's report was accepted for filing with the Society's Recording Secretary.

The Rev. Clement Bastnagel, as chairman of the Membership Committee, reported an active membership of 621, and an inactive membership of 405, for a total of 1,026. Active membership among the hierarchy ran to 74, and while the U.S.A. and Possessions accounted for an active membership of 490, Canada contributed 34, Italy 8, Africa 7, England 3, Mexico 3, Belgium 1, and East Pakistan 1, for the overall total of 621. Through statements, notices, bulletins, and offprints of articles these members were kept in periodic contact with the Society's headquarters through the General Secretary.

The Treasurer's report was furnished in lithoprinted form by the Rev. Clement Bastnagel, the Society's Treasurer. The income during the year had been $6,150.97, and the expense $7,198.81. This disparity was occasioned by the fact that 37,200 copies of offprints, costing $2,332.26, had been sent out to the membership. In view of the service rendered through this procedure it was not regarded by the Treasurer as uncommendable that the Society's assets stood at $18,798.63, as compared with the previous year's total of $19,846.47. The treasury was regarded as reflecting a condition not abnormal or unhealthy.

During the past year 9 dissertations, in approximately 1950 copies, had been distributed. The Society's composite record in this regard revealed that since 1939 there had been distributed 224 separate dissertations in approximately 56,700 copies. Some forty titles could still become published if their authors brought their work to its ultimate desired conclusion. The report as made by the Treasurer was accepted and approved by the assembly.

The Rt. Rev. Walter J. Furlong, P.A., as chairman of the General Arrangements Committee, indicated the threefold function of this Committee: first, the selection of the site for the next convention; second, the planning of the program and of the agenda for the next convention, and third, the selection of a slate of prospective candidates for office for the coming year. Monsignor Furlong first of all spoke a word of thanks to Bishop Gorman and the Local Arrangements Committee, headed by the Rev. Fred J. Mosman of Dallas as chairman, for their splendid work with reference to the Dallas meeting. He then read a letter from His Excellency, the Most Rev. Archbishop Patrick A.

O'Boyle, inviting the Society for its next annual convention, the 1958 meeting, in the City of Washington, D. C. The initial meeting in 1939 had been held in Washington, D. C., and the Society felt happy over the prospect of a return to the Nation's Capital for its 20th annual meeting. Preparations were already under way under the chairmanship of Monsignor E. Robert Arthur of Washington. Monsignor Furlong asked that the election of the Society's officers be postponed until the following day, Thursday.

For a report from the Regional Conferences Committee Bishop Casey turned to the Rt. Rev. Augustine T. Mozier, P.A., in the absence of the Very Rev. Benjamin F. Farrell, its chairman. Monsignor Mozier read a letter from Father Farrell, which pointed to the formation of a new Gulf Coast Conference. The Regional Conference meetings held at Notre Dame and in New York City during the past May were both conducted with much success. It was hoped that other sections of the country, such as the Southeast and the Southwest, might organize a Regional Conference, so that in this manner it would be made possible for the Society's members to be geographically near the centers at which they could attend Regional Conference meetings.

Bishop Casey then read the list of the following members deceased during the past year:

The Most Rev. Edward F. Ryan, D.D. (Burlington), died November 3, 1956;
The Most Rev. Thomas E. Molloy, D.D. (Brooklyn), died November 26, 1956;
The Most Rev. Bartholomew J. Eustace, D.D. (Camden), died December 11, 1956;
The Most Rev. Jules B. Jeanmard, D.D. (Retired), died February 23, 1957;
The Most Rev. Michael J. Ready, D.D. (Columbus), died May 2, 1957;
The Most Rev. Louis B. Kucera, D.D. (Lincoln), died May 9, 1957;
The Most Rev. Frank A. Thill, D.D. (Salina), died May 22, 1957;
The Most Rev. Richard T. Guilfoyle, D.D. (Altoona), died June 10, 1957;
The Most Rev. Henry P. Rohlman, D.D. (Retired), died September 13, 1957;
The Rt. Rev. Henry F. Dugan (Indianapolis), died January 16, 1957;
The Rt. Rev. Joseph A. Newman (Louisville), died March 31, 1957;
The Rt. Rev. Joseph A. Hale (Winona), died October 1, 1957;
The Rev. Peter L. Rushman, S.V.D. (Techny, Ill.), died November 12, 1956;
The Rev. Raymond J. Kinneavy (Davenport), died November 30, 1956;
The Rev. John J. Reed, S.J. (Woodstock, Md.), died January 9, 1957;
The Very Rev. Charles J. Melchior, O.S.A. (Detroit), died January 16, 1957;
The Rev. Vincent R. Hallstein (Pittsburgh), died April 25, 1957;
The Rev. Charles J. Koudelka (Milwaukee), died May 3, 1957;
The Rev. Angelus Muenzloher, S.D.S. (St. Nazianz, Wisconsin), died August 16, 1957.

Prayer was offered for the repose of their souls.

With all the committees heard from, and all the reports made, the session adjourned at 12:35 P.M.

Early Afternoon Session

During this session, which convened at 2:15 P.M., the Rt. Rev. John F. Gannon, V.G., of Springfield, Mass., presented a most informative paper on Diocesan Insurance Problems and Plans. The discussion period evoked many reflections which manifested how variously organized plans proved successful in the various dioceses and archdioceses. It was felt that chancery officials could profitably look for counsel and advice in these matters to well trained laymen who, as successful in business matters, could share their business acumen with the ecclesiastical authorities for the achievement of a well balanced policy and procedure.

Late Afternoon Panel Sessions, October 16th

The membership could select which of three Panel Discussions it wanted to attend at 4:00 P.M. Chancery Problems were discussed under the moderation of the Rt. Rev. Edward M. Burke, P.A. (Chicago); Tribunal Problems with the Rt. Rev. Joseph L. Manning, P.A. (San Antonio) as moderator, and Seminary Problems under the leadership of the Rev. John J. Goodwine (New York, Dunwoodie Seminary). Each of the moderators was on the following day to offer a substantial report regarding these discussions.

Open House at Bishop's Residence

The evening of the first full day was left free for the convention members. Bishop Gorman's cordial invitation made his residence the place for a delightful buffet supper, at which there was a quite general attendance. The visit to the Bishop's residence, and the gracious hospitality he there dispensed to all, contributed greatly to a closer bond of acquaintanceship and a greater realization of the common problems, canonical and otherwise, among the assembled guests. The informality of this meeting did much to unite the guests in their determination to reap mutual benefits from their convention attendance.

Earlier Morning Session, October 17th

This session was convened at 10:00 A.M. The Rt. Rev. Josiah G. Chatham (Natchez-Jackson) delivered a closely worked-out paper, in which he analyzed the Rota decisions for the last seven years on the factors of force and fear as invalidating marriage. The speaker made it most easy and convenient for the assembly to follow him in the discussion through his previous distribution of lithoprinted copies of his paper. The fully allowed time for the presentation of the paper and the subsequent discussion was utilized before the session was adjourned.

Later Morning Session

After a short respite the second morning session was convened. The Rev. Kenneth R. O'Brien (Los Angeles) presented a paper on the Conflicts of Law in Canon Law. The canonical and the civil approaches to questions of mutual interest to the two legal realms were explored, and thereupon practical sug-

gestions were offered for the reaching of a final settlement. Discussion from the floor added to the cases considered in the paper. Thus a fair indication was given of how unnecessary conflicts may be avoided, and of how seeming conflicts may be conciliated. The session was adjourned at 12:30 P.M.

Election Session, October 17th

The early afternoon session was concerned with the election of officers for the ensuing year. The Nominating Committee, identified with the General Arrangements Committee, proposed the following candidates:

For the Office of President:

The Rt. Rev. Vincent J. Hines (Hartford);
The Rt. Rev. Chester A. Ropella (Green Bay);
The Very Rev. John S. Quinn (Chicago);

For the Office of Vice-President:

The Rt. Rev. Joseph I. Johnson (Springfield, Mass.);
The Very Rev. Monsignor J. D. Conway (Davenport);
The Rev. Kenneth R. O'Brien (Los Angeles);

For the Office of Recording Secretary:

The Rev. John J. Goodwine (New York);
The Very Rev. Damian J. Blaher, O.F.M. (Washington, D. C.);
The Rev. James I. O'Connor, S.J. (West Baden Springs, Ind.);

For the Office of General Secretary-Treasurer:

The Rev. Clement Bastnagel (Washington, D. C.).

Upon the casting of the ballots the Moderators of the three Panel Discussions submitted their report. The lengthy discussions which followed were in themselves an unmistakable indication of the popular interest attaching to this kind of free and informal appraisal of the problems explored in the panel discussions.

When a count of the ballots had been made, the election returns favored Monsignor Quinn as President, Monsignor Johnson as Vice-President, the Very Rev. Damian J. Blaher as Recording Secretary, and the Rev. Clement Bastnagel as General Secretary-Treasurer. Upon this announcement the session was adjourned.

Late Afternoon Meeting, October 17th

The last of the formal sessions, which was convened at 4:00 P.M., dealt with a paper written by the Very Rev. T. Lincoln Bouscaren, S.J. (Rome) and presented by the Rev. James I. O'Connor, S.J. (West Baden Springs, Ind.). This paper furnished a panoramic view of the multifarious constructive work which in recent times has been accomplished by the Sacred Congregation for Religious. Because of the minutely informative character of this paper, as also because of its author's absence, there was a less sustained period of discussion from the floor. The assembly extended a vote of thanks to the several authors of the papers delivered during the convention, and then, upon

adjournment, made ready for a preprandial enjoyment of good fellowship. At the banquet both Bishop Casey and Bishop Gorman addressed the ones in attendance, and Monsignor Quinn, when he had stated his aims as President for the ensuing year, announced the committee appointments along with the newly constituted membership of the General Executive Committee.

EXECUTIVE COMMITTEE

Chairman	The President
Members *ex officio*	The Vice-President
	The Recording Secretary
	The General Secretary-Treasurer
Members by Appointment	The Most Rev. John J. Carberry, D.D (for 1 year)
	The Rev. Kenneth R. O'Brien (for 1 year)
	The Most Rev. James V. Casey (for 2 years)
	The Rt. Rev. Walter J. Furlong, P.A. (for 2 years)

COMMITTEE ON RESEARCH AND DISCUSSION

Chairman	The Rev. Richard A. Rosemeyer (Chicago)
Member	The Very Rev. Philip Leinfelder (Yakima)
Member	The Rev. Joseph J. Quinn (New York)

COMMITTEE ON MEMBERSHIP

Chairman	The Rev. Clement Bastnagel (Washington, D. C.)
Member	The Rt. Rev. Michael J. Mleko (Lansing)
Member	The Rev. Fred J. Mosman (Dallas)

GENERAL ARRANGEMENTS COMMITTEE

Chairman	The Very Rev. Monsignor Joseph B. Stenger (Belleville) (Term ends in October, 1958)
Member	The Rt. Rev. John M. Costello (New York) (Term ends in October, 1959)
Member	The Rt. Rev. Josiah G. Chatham (Natchez-Jackson) (Term ends in October, 1960)

REGIONAL CONFERENCES COMMITTEE

Chairman	The Rt. Rev. Augustine T. Mozier, P.A. (Camden)
Member	The Rev. John Ward (Los Angeles)
Member	The Rt. Rev. Warren L. Boudreaux (Lafayette, La.)

LOCAL ARRANGEMENTS COMMITTEE

Chairman	The Very Rev. Monsignor E. Robert Arthur (Washington, D. C.)
Members	Others as appointed by the Chairman.
Convention City for 1958	Washington, D. C. (Twentieth Annual Convention)

Date of 1958 Convention	Tuesday and Wednesday, October 14 and 15, 1958
Headquarters for the 1958 Convention	The Mayflower Hotel
Chairman's Address	The Very Rev. Msgr. E. Robert Arthur, J.C.L., 1725 Rhode Island Avenue, N.W., Washington (17), D. C.

Upon these announcements all scheduled functions for the nineteenth annual convention of the Canon Law Society of America reached their close. As the Dallas visitors disbanded for their journey homewards they looked forward to the Convention in Washington, D. C., on October 14-15, 1958, at the Mayflower Hotel.

CLEMENT BASTNAGEL